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Supreme Court, U.S.
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No. 10- 101103

IN THE
Supreme Court of the United States

WALTER ROSALES AND KAREN TOGGERY,

Petitioners,

v.

UNITED STATES

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court holds that the Indian Reorganization Act ("IRA"), 25 U.S.C. §479, "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri v. Salazar* (*"Carcieri"*), 129 S.Ct. 1058, 1061 (2009), now followed by the District of Columbia Circuit in *Patchak v. Salazar* (*"Patchak"*), No.09-5324, 2011 WL 192495 (D.C. Cir. 2011).

Here, the Federal Circuit held in conflict with these decisions, that whether the tribe was under Federal jurisdiction in 1934 was irrelevant, in determining whether the tribe became a beneficial owner of Indian trust land. The questions presented are:

1. Must a court decide whether a tribe was under Federal jurisdiction in 1934, whenever a tribe claims an interest in Indian trust land adverse to a state or individual's interest in that property?

2. Must a court decide whether a tribe was under Federal jurisdiction in 1934, when determining the timeliness of Petitioners' Tucker Act claims that the tribe never became a beneficial owner of Indian trust land?

3. Must a court decide whether a tribe was under Federal jurisdiction in 1934, in determining whether the tribe was a required, but absent party, claiming an interest in Petitioners' beneficial interest in trust property?

PARTIES TO THE PROCEEDING

The caption of the case includes the names of all parties.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit, filed September 17, 2010, is set forth in the Appendix ("App.") at 1a-4a. The decision of the United States Court of Appeals for the Federal Circuit, denying panel rehearing, and rehearing *en banc*, filed December 8, 2010, is set forth at App.5a-6a. The decision of the United States Court of Federal Claims, reported at 89 Fed. Cl. 565 (2009), is set forth at App.7a-55a.

JURISDICTION

On December 8, 2010, the court of appeals denied Petitioners' timely petition for rehearing. App.5a-6a. The judgment sought to be reviewed was entered on October 14, 2009. App.7a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves U.S. Const. amend. V, the Indian Reorganization Act of 1934, 25 U.S.C. §465 and §479, and Rule 19 of the Rules of the Court of Federal Claims, the relevant portions of which are set forth verbatim at App.57a-65a.

INTRODUCTION

This petition presents jurisdictional issues of enormous import to scores of states, hundreds of tribes, and hundreds of thousands of individual Indians and non-Indians across the country, as did the petition in *Carcieri*, concerning disputes among the states, individual Indians, and their tribes, as to the beneficial ownership of trust land throughout the nation. That is because the Federal Circuit has created a means to avoid this Court's holding in *Carcieri* and the District of Columbia's decision in *Patchak*. The allocation of civil and criminal jurisdiction between states and tribes over trust land is again no longer subject to a uniform rule of law, but the erroneous claims of any of the 306 tribes not under Federal jurisdiction in 1934.

The questions presented by this petition must be confronted so that this Court may restore uniformity in the rules to be applied to a tribe's claims to trust land, and may continue to prevent the loss of state sovereignty to Indian tribes that was not authorized by Congress.

STATEMENT OF THE CASE

Historical Background

1. Petitioners' Beneficial Interest in the Trust Parcel

Petitioners are Native American residents of San Diego County of one-half or more degree of Indian blood, enrolled members of the Jamul Indian Village, and the individual beneficial owners of trust land in San Diego

County, known by the tax assessor parcel number, 597-080-04. Court of Appeals Appendix ("C.A.App."), 377.

On December 27, 1978, the prior fee simple owners granted the parcel to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." C.A.App.425. This deed was accepted by the government, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §465 and §479. This grant deed created the fiduciary duty and general trust responsibility of the government to protect the half-blood Jamul Indians' beneficial interest in the trust property, against all forms of alienation, trespass, and adverse claims, particularly from a tribe that was not under Federal jurisdiction in 1934. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 226, fn. 31 (1983), citing *Coast Indian Community v. United States* ("*Coast*"), 550 F.2d 639, 652, fn 41 (Ct. Cl. 1977), *aff'd*, 578 F.2d 1391 (Ct.Cl. 1978), and cases cited therein.

The government designated the individual Petitioners and their families then possessing and residing on the land, as the beneficial owners of the trust parcel, consistent with the federal regulations for unorganized groups of individual Indians, by locating said individual Indians on the parcel, building houses for them, providing for their needs, acquiescing in their continued presence on, and use of, the parcel for more than 28 years. *Coast*, at 644.

Such individual Indians are officially designated as the beneficial owners of trust property, as a matter of law, when the government openly and notoriously "locates" the individual Indians on the parcel, "acquiesces in their continued presence on and use of" the parcel, allows them to inter their families' remains and funerary objects, below, on, and above the parcel, and "provides plaintiffs with services usually accorded to Indians living on" such property. *Coast* at 644. This "provides strong and uncontroverted evidence of their designation as the beneficiaries within the meaning of the deed... on such evidence, designation may be inferred by law." *Coast* at 644, citing *United States v. Assiniboine Tribe* (*"Assiniboine Tribe"*), 428 F.2d 1324, 1329-30 (Ct. Cl. 1970).

Coast, held on nearly identical facts, that the trust parcel in question, "was not acquired for a tribe, leaving only the possibility under the [IRA] that it was purchased for individual Indians." 550 F2.d 639, 651, n. 32, 213 Ct. Cl. 129, 172. Thereby, the parcel became "individually owned land," per 25 C.F.R. 161.1(b)(1975), 162.101 and 169.1(b) (2010), requiring consent of the individual beneficial owners before it can be lawfully transferred to any tribe. *Coast*, at 213 Ct.Cl. 129, 172-73.

The *Coast* deed "was conveyed to the United States: ... 'in Trust for such Indians of Del Norte and Humboldt Counties, in California, eligible to participate in the benefits of the [Indian Reorganization] Act of June 18, 1934, as shall be designated by the Secretary of the Interior...'" 550 F.2d 641-41. The Jamul deed was also conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." C.A.App.425.

In *Coast*, the individual Indians in the unincorporated community association, having been found to be the beneficial owners of the property, also had to have the judgment awarding $47,500 to them as individuals amended so that they could transfer their individual interest in the $47,500 to their association, the Coast Indian Community. 550 F.2d at 641, 578 F.2d at 1391. Here, the designated individual Jamul Indians never transferred their beneficial interest in the trust parcel to the subsequently created tribe.

Just as with the Naragansett in *Carcieri*, and the Jamul tribe here: "The Coast Indian Community does not come within [the IRA] definition [of an Indian tribe under Federal jurisdiction in 1934], for it is not a tribe in the anthropological sense of the term, nor is it organized or a pueblo, nor were its members residing together on one reservation before or at the time of the Rancheria acquisition. The Rancheria, then, was not acquired for a tribe, leaving only the possibility under the Act that it was purchased for individual Indians. The deed and proclamation say nothing to contradict this. Thus, the land was taken in trust for the individual Coast Indian Community members," *Coast* at 651, n32, "and the members were the beneficial owners of the Rancheria,... [s]ince the Rancheria falls within the description of 'individually owned land' in 25 C.F.R. 161.1(b) (1975)." *Coast*, 213 Ct. Cl. 129, 163-64, 172-73.

Therefore, as in *Coast*, the trust parcel was not acquired for the tribe, leaving only the possibility under the Act that it was acquired for the individual Indians, including the Petitioners, and they are the beneficial owners of the trust parcel. As the beneficial owners of the trust parcel, the Petitioners were entitled to be secure in their homes, and to exclude all others, save the United States, from the trust parcel. *United States v. Buchanon*, 232 U.S. 72, 76-77 (1914).

Justice Breyer's concurring opinion in *Carcieri*, at 1070, and Justice Stevens' dissenting opinion, at 1074-75, acknowledge that individual Indians have often been designated as beneficial owners of trust property under 25 U.S.C. §465, citing 1 *Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917-1974* (*Mem. Sol. Int.*), pp. 706-707, 724-725, 747-748 (1979). "The Secretary has long exercised his §465 trust authority in accordance with this design... the Solicitor of the DOI repeatedly advised that the Secretary could take land into trust for...individual Indians who qualified for federal benefits by lineage or blood quantum...Unless and until a tribe was formally recognized by the Federal government and therefore eligible for trust land, the Secretary would take land into trust for individual Indians who met the blood quantum threshold," [for example], "the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Inland Indians of Michigan." *Carcieri*, at 1070, 1074-75.

In fact, the DOI Solicitor's Memorandum Opinion concerning the St. Croix Chippewas, *Mem. Sol. Int.*, at 724, A456, and *Cohen's Federal Indian Law Handbook*, § 3.02, p. 146 (n99) Footnote 105 (2005), confirm that where the grant deed fails to contain the final phrase, "until such time as they organize under section 16 of the [IRA] and then for the benefit of such organization," the property remains in trust for the individual Indians, who have never consented to transfer their beneficial interest to any subsequently recognized tribe.

With regard to the Mississippi Choctaw, the DOI Solicitor found that neither a grant deed that makes no mention of the tribe, nor a subsequently adopted constitution that makes no mention of the subject property, can "designate" a "tribe" that doesn't then exist as the trust property's beneficiary, since there was "in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe," at the time of recording of the deed. *Mem. Sol. Int.*, at 668. Similarly here, there was no existing tribe of Indians known as the Jamul Indian Village in 1934, or when the grant deed was recorded in 1978.

In 1936, the Solicitor describes the words that should have been used to put the property in trust for any subsequently recognized tribe of Choctaws: "The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe pursuant to the act of June 18, 1934 (48 Stat. 984), and then in trust for such organized tribe." *Mem. Sol. Int.*, at 668. However, the deed did not contain these words.

There, as here, the government's 40 year open and notorious location of the individual Choctaw Indians on the subject property and acquiescence in their continued presence on, and use of, the subject property, meant that "only those individuals designated by the Interior Secretary were to have the benefit of this" designation, not a subsequently recognized tribe, and that a new grant deed was required to grant the subsequently recognized tribe beneficial ownership of the property. *Id.*

In 1976, the Fifth Circuit held that since the relief Act did not contain the words: "until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe" or "then in trust for such organized tribe," the property remained in trust for the individual Indians, and not a subsequently recognized tribe. *United States v. State Tax Comm. of Mississippi* ("*Miss. State Tax Comm.*"), 535 F.2d 300, 304 (5th Cir.1976). The absence of the words "then in trust for such organized tribe," meant that "only those individual [Choctaws] designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either a tribe nor a reservation is mentioned." *Id.*

Since 1936 the DOI Solicitors have expressly instructed the BIA field superintendents: "In all of those cases where the title papers have already been returned to the field, instructions should be given to the field agents to have the deeds corrected before they are recorded. In that case [as here] where the deed has already been recorded and accepted, it will be necessary to secure a new deed." *Mem. Sol. Int.*, at 668.

Here, the deed for the trust parcel was never transferred, altered, or re-recorded. The 1978 grant deed does not contain the words, "until such time as they organize," proscribed by the U.S. Solicitor to lawfully transfer the property into trust for the tribe, after the tribe was recognized. Nor does it state: "and then in trust for such organized tribe." There was no transfer of the designation of the individual Petitioners' beneficial ownership of trust parcel to the subsequently recognized tribe, since such a transfer still requires the consent of the individual Indian beneficial owners and the recording of a grant deed, and no subsequent grant deed has ever been recorded. *Coast*, 213 Ct. Cl. at 172-73, citing 25 C.F.R. 161.1(b)(1975); *Mem. Sol. Int.* at 668; *Coast*, 550 F.2d at 1391, requiring transfer of the individual Indians' beneficial interest to the subsequently recognized tribe.

Therefore, the holding in *Carcieri*, the government Solicitors' own memoranda, and the 32 year old precedent in *Coast*,[1] estop the government from denying that the parcel remains in trust for the designated "Jamul Indians of one-half degree or more Indian blood," including Petitioners, as a matter of law, since the tribe was not under Federal jurisdiction in 1934. This scenario has been repeated many times, with scores of tribes, and thousands of individual Indian beneficial owners, which this Court acknowledged in granting *certiorari* in *Carcieri*.

2. The Tribe Was Not Under Federal Jurisdiction in 1934, and Never Acquired any Interest in the Trust Parcel

It is undisputed that the Jamul Indian Village was not under Federal jurisdiction in 1934. The December 27, 1978 grant deed was recorded nearly three years before the constitution of the Jamul Indian Village was adopted on July 7, 1981, and nearly four years before any acting deputy assistant secretary of the United States purported to recognize the creation of the Jamul Indian Village, on November 24, 1982. C.A.App. 425, 452; 47 Fed. Reg. 53132 (1982).

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[1] *Coast* has been steadily relied upon by this Court, *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 226, fn. 31 (1983), the Federal Circuit, *Texas State Bank v. United States*, 423 F.3d 1370 (Fed. Cir. 2005), *Shoshone Indian Tribe of Wind River Res. v. United States*, 364 F.3d 1339, (Fed. Cir. 2004), *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), more than 20 Fed. Cl. cases, including recently, *Osage v. United States*, 72 Fed. Cl. 629, 643 (2006), and *Innovair Aviation Ltd. v. United States*, 83 Fed. Cl. 498, 500 (2008), and the Ninth Circuit in *United States v. Wilson*, 881 F.2d 596, 599 (9th Cir. 1989).

The trust parcel was not acquired for any Indian tribe, and has never been recognized by the government as being a parcel over which the entity, known as the Jamul Indian Village, has governmental power. Nor has it ever been lawfully subject to the exercise of any tribal governmental power. Congress has yet to recognize, and has never exercised federal jurisdiction over the Jamul Indian Village.

Nor could the trust parcel have been acquired for a tribe that did not then exist, leaving only the possibility under 25 U.S.C. §465, that it was acquired in trust for the individual Indians, including the Petitioners, then possessing and residing on the parcel, as recognized in *Carcieri*, at 1068, 1070, 1074-75, *Coast*, 644, 651, n32, *Assiniboine Tribe*, 690, *Miss. State Tax Comm.*, 304, and *Mem. Sol. Int.*, 668, 724, 747, and 1479.

On May 9, 1981, Petitioner Walter Rosales, Chairperson of those Indians seeking to adopt a constitution, certified on behalf of the election board, that sixteen of twenty three registered voters adopted the Jamul Indian Village constitution. C.A.App.451. An acting deputy assistant secretary of Interior approved the constitution on July 7, 1981, but still did not recognize the existence of the tribe. C.A.App.452 On November 24, 1982, the BIA, and not Congress, first listed the Jamul Indian Village, as an Indian tribe, by publication in 47 Fed. Reg. 53132 (1982).

Thus, the BIA Director of Tribal Services declared that the Jamul Indian Village is a "created tribe," not a "historical tribe," and therefore "not an inherent sovereign." C.A.App.467. It has yet to be recognized by Congress, which still has never put the village "under federal jurisdiction," nor has Congress granted the village "jurisdiction" over the trust parcel, after 33 years. Only Congress has plenary power over Indian affairs, and therefore only Congress can create a tribe's jurisdiction.[2] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *United States v. Sandoval*, 231 U.S. 28, 46 (1913), citing *United States v. Holliday*, 70 U.S. 407, 418 (1865). "An Indian tribe's jurisdiction derives from the will of Congress." *Kansas v. United States*, 249 F.3d 1213, 1229-31 (10th Cir. 2001).

The Jamul Indian Village is one of 88 "created tribes," which has ostensibly been given "executive recognition" by the BIA, without specific delegation by Congress, but has never been granted any jurisdiction over the trust parcel by either the BIA or Congress.[3]

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[2] *See for e.g.*, Pub. L. No. 92-470, 86 Stat. 783(1972), in which the Payson Community of Yavapai-Apache Indians was the first of only 16 tribes since 1934, which does not include the Jamul Indian Village, "recognized [by Congress] as a tribe of Indians within the purview of the Act of June 18, 1934."

[3] *Full Committee Oversight Hearing on the "Supreme Court decision Carcieri v. Salazar Ramifications to Indian Tribes": Before the House Natural Resources Comm.*, 111th Cong., 1st Sess. (April 1, 2009)(written testimony of Donald Craig Mitchell, the former vice-president and general counsel of the Alaska Federation of Natives, and counsel to the Governor of Alaska's Task Force on Federal-State-Tribal Relations), "...the Deputy Commissioner of Indian Affairs asserted that Congress intended 5 U.S.C. 301 and 25 U.S.C. 2 and 9 to delegate the Secretary of the Interior authority to create new 'federally recognized

When the Jamul Indian Village was created it was a landless governmental entity. The Bureau of Indian Affairs, August 3, 2000 response to the Petitioners' Freedom of Information Act (FOIA) request, concedes that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66 acres)," and that there is no record of the 1978 trust parcel being known as the Jamul Indian Village. C.A.App.429. This is consistent with the tribe's constitution, Article II, Territory, which fails to identify the trust parcel as within the territory of the Jamul Indian Village. C.A.App.442. Moreover, the United States did not have the authority to take the parcel into trust for the Jamul Indian Village, since it was not under Federal jurisdiction in 1934. *Carcieri* at 1061, 1064-5, 1068.

> The BIA Director of Tribal Services further concluded on July 1, 1993:
>
> The Jamul Indians lived on one acre of private land and on land deeded to the Diocese of San Diego as an Indian cemetery. On June 28, 1979,

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tribes' in Congress' stead...However, those statutes contain no such delegation of authority. See William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition*, and 25 C.F.R. 83, 17 American Indian Law Review 37, 47-48 (1992)(5 U.S.C. 301 and 25 U.S.C. 2 and 9 discussed). *See also, Federal Recognition of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 14 (1978) (Letter from Rick V. Lavis, Acting Assistant Secretary, to the Honorable Morris Udall, dated August 8, 1978, admitting that 'there is no specific legislative authorization' for the Secretary's tribal recognition regulations)," found at resourcescommittee. house.gov., and 2009 WL 850102, *9 (F.D.C.H.).

the United States acquired from Bertha A. and Maria A. Daley a portion of the land known as "Rancho Jamul" which it took "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate."...The United States accepted these conveyances of land in accordance with the authority contained in Sections 5 and 19 of the Indian Reorganization Act of 1934 [25 U.S.C. §465, and §479 respectively]...

The Constitution of the Jamul Indian Village was approved by the Deputy Assistant Secretary-Indian Affairs on July 7, 1981. In approving the IRA Constitution, the Village was authorized to exercise those self-governing powers that have been delegated by Congress or that the Secretary permits it to exercise. A number of "tribes" have been created, from communities of adult Indians, or expressly authorized by Congress under provisions of the IRA and other Federal statutes. For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution and are considered to be IRA "tribes." However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. They are not an inherent sovereign. Rather, that entity is a created tribe exercising delegated powers of self-government. Such is the case with Jamul Indian Village. C.A.App.467.

The Jamul Indian Village therefore has never had jurisdiction, nor lawfully exercised governmental power, over the trust parcel. There has never been a lawful transfer of the parcel to the subsequently recognized tribe. Nor has the government ever designated the subsequently recognized tribe to be the beneficial owner of the trust parcel. Hence, by 2007, neither the tribe, nor its tribal court, had jurisdiction over the trust parcel, and cannot have lawfully evicted the Petitioners.

The government has no evidence that the subsequently created "tribe," "Jamul Indian Village," was ever designated as the beneficiary of the trust parcel, nor that a grant deed ever lawfully transferred the parcel to the tribe. In fact, there is only evidence that the Secretary designated the individual "Jamul Indians of one-half or more Indian blood" to be the beneficiaries of the trust parcel by allowing them to reside upon the trust land for 28 years.

Thus, the government remains estopped to deny, that the "only possible" designation that exists in the grant deed, as a matter of law, is that the trust parcel was taken in trust for "individual" "Jamul Indians of one-half degree or more Indian blood," including the individual Petitioners and their families, as held in *Coast,* at 651, n32, *Miss. State Tax Comm.*, at 304, *Assiniboine Tribe,* at 1329-30, *Mem. Sol. Int.*, 668, 724, 747, 1479, and as acknowledged by *Carcieri* at 1061, 1064-5, 1068, 1070. The government failed to follow Congress' guidelines and its own *Handbook of Federal Indian Law* for recording a grant deed to a tribe, particularly since it was not allowed to hold land in trust for a tribe that was not under Federal jurisdiction in 1934. Therefore, the existing grant deed for the trust parcel only created a beneficial interest in the individual Jamul Indians of one-half degree or more Indian blood. *Mem. Sol. Int.* at 668, 724, 747, and 1479; *Carcieri* at 1070; *Cohen's Handbook of Federal Indian Law* ("*Handbook*"), §3.02, p. 135 (2005).[4]

In fact, the Interior Solicitor specifically advised the BIA field personnel that any transfer of the individual Indians' designated beneficial interest to any subsequently recognized tribe, must still be accomplished the old-fashioned way by recording a grant deed to the subsequently recognized tribe. *Mem. Sol.* Int. at 668. No such deed was granted in this case.

The government's regulations provide that the trust parcel is "individually owned land," per 25 C.F.R. §161.(b)(1975), §162.101, §169.1(b) (2010), and its own Solicitor's memoranda require that the Petitioners must consent to any transfer of their individual beneficial interest in the trust parcel to a subsequently recognized tribe, before the tribe acquires any jurisdiction over the parcel. *Coast*, 213 Ct. Cl. 129, 172-73; *Coast*, 578 F.2d 1391; *Mem. Sol. Int.* at 668.

Here, there is no evidence of any such consent by the individual half-blood Jamul Indians, including the Petitioners. Most importantly, the original deed was never corrected or altered, and the government never recorded any subsequent grant deed, transferring the individual

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4. Congress directed the Secretary of Interior to revise and republish *Cohen's Handbook of Federal Indian Law* in the Indian Civil Rights Act of 1968, 25 U.S.C. 1341(a)(2), which is now published under contract by the University of New Mexico.

Indians' beneficial interest in the trust parcel to any tribe, including the Jamul Indian Village. Nor could the government transfer the beneficial interest in the trust parcel to the subsequently recognized tribe, since it was not under Federal jurisdiction in 1934.

Where, as here, there was no such consent and no subsequent grant deed was recorded, the individual Petitioners' beneficial ownership of the trust property was not transferred to any subsequently recognized tribe, as a matter of law. *Coast*, 550 F.2d 639, 651, n.32; *Coast*, 213 Ct. Cl. 129, 172. "This approach has also been used for the Quartz Valley Indians, Duckwater Shoshone Indians, Yomba Shoshone Indians, Port Gamble Band of Clallam Indians, and Sokaogan Chippewa Indians." *Handbook*, §3.02, pp. 135, 146 (n99) Footnote 105 (2005); *Handbook*, Ch.1, §B2e, at p.15-16, fn 86 (1982), as acknowledged in *Carcieri* at 1070 and 1074-75, and *Mem. Sol. Int.* at 668, 706-707, 724-725, 747-748, 1479. Therefore, the tribe never acquired any interest in the trust parcel, which remains in trust for the Petitioners' possession, use and quiet enjoyment.

3. The Government Failed to Protect Petitioners' Beneficial Interest in the Trust Property after November 12, 1992

The government first failed to protect Petitioners' beneficial interest in the trust property, after November 12, 1992, when the Petitioners' mobile homes were destroyed. C.A.App.493-95.

The first time the tribe claimed, and the government acknowledged the tribe's claim, that the trust parcel was not beneficially owned by the Petitioners, was on

February 5, 2001, when they jointly issued a Notice of Land Acquisition Application for the neighboring parcel. C.A.App.144; 73 Fed. Appx. 913-14.

Thereafter, the government has continuously breached its fiduciary duty and general trust responsibility to the Petitioners by failing to: (1) enforce the Petitioners' beneficial interest in the grant deed for the trust parcel; (2) block the Petitioners' eviction from the trust parcel; and (3) seek the return of the possession, use and quiet enjoyment of the trust parcel to the Petitioners. *Jones v. United States*, 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986).

Since then, Petitioners have repeatedly demanded, and the government has continuously refused, to protect their beneficial interest in the trust property. As a result, the government has breached its fiduciary duty, and the trust parcel has been taken from the Petitioners without just compensation.

On March 10, 2007, Petitioners were forcibly removed from their residences at gunpoint, against their will, after they were beaten and pepper sprayed in violation of their rights under the U.S. and California Constitutions, and completely deprived of the use and quiet enjoyment of their beneficial interest in the trust property. On March 12, 2007, the Petitioners' homes were illegally demolished by bulldozers.

Court of Federal Claims Proceedings

On November 12, 1998, Petitioners' timely filed their original claims in the United States Court of Federal Claims for the government's breach of its fiduciary duty to protect their beneficial interest in the trust property, and for the taking of their beneficial interest in the trust property without due process.

On July 15, 2008, Petitioners filed a supplemental complaint in the Court of Federal Claims, which was amended on June 24, 2009, alleging subsequent acts by the government breaching its fiduciary duty and constituting a further taking. On August 12, 2008, the government filed a Notice of Related Case, noting that both the original action, and the subsequent supplemental action, alleged claims that the government had failed to enforce the Petitioners' beneficial ownership of the land at issue, breaching its fiduciary duty and constituting a taking of the property. Petitioners moved to consolidate the two cases.

On October 1, 2008, both cases were transferred to Court of Federal Claims Judge Lawrence Block, since they involved common issues of fact and law, concerned the same parties and claims regarding the same parcel of land, and since transfer would be likely to conserve judicial resources and promote an efficient determination of both actions.

On October 7, 2009, the Court of Federal Claims granted the government's motion to dismiss both actions for lack of jurisdiction, finding that they both "arise out of a common set of facts and implicate similar principles of law," that Petitioners' claims were not filed within six years of the tribe's constitution being approved in 1981, and that the tribe was a required, but absent party, pursuant to R.C.F.C. Rule 19. App. 9a, 31a, 46-48a.

Federal Circuit Proceedings

On November 25, 2009, Petitioners timely filed a notice of appeal of the Court of Federal Claims' joint order dismissing both actions.

The Federal Circuit affirmed the Court of Federal Claims' dismissal, labeling it nonprecedential, "primarily on the basis of the opinion of that court," reported at 89 Fed. Cl. 565 (2009), "with the following additional statement: ... *Carcieri*, however has nothing to do with the present case." App.2a.

Petitioners' timely petition for panel rehearing, and rehearing *en banc*, was denied on December 8, 2010. App.6a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit decided an important issue of federal law in a way that conflicts with, and allows any of 306 tribes to avoid, this Court's decision in *Carcieri v. Salazar ("Carcieri")*, 129 S. Ct. 1058, (2009), and the District of Columbia Circuit's decision in *Patchak v. Salazar ("Patchack")*, No. 09-5324, 2011 WL 192495 (D.C. Cir. 2011).

1. The Federal Circuit's Decision Conflicts with this Court's Decision in *Carcieri v. Salazar*

Contrary to the Federal Circuit's decision, App.2a, *Carcieri* has everything to do with this case. The Federal Circuit erroneously dismissed Petitioners' claims that the United States breached its fiduciary duty to protect Petitioners' beneficial interest in trust property from erroneous claims of an Indian tribe not under Federal jurisdiction in 1934. This dismissal is in conflict with this Court's holding that the government cannot hold land in trust for an Indian tribe not under Federal jurisdiction in 1934. *Carcieri*, at 1068.

The Federal Circuit employed the wrong legal standard to dismiss Petitioner's claims for lack of jurisdiction, erroneously holding that whether the tribe was under Federal jurisdiction in 1934, was not relevant in determining: (1) whether the limitations period of the Tucker Acts had run, or (2) whether the tribe was a required, but absent party, claiming an interest in the Petitioners' trust property. App.2a.

Had the Federal Circuit followed *Carcieri*, Petitioners' claims could not have been dismissed under the Tucker Acts' statutes of limitation, since the Federal Circuit was required to decide that the tribe was not under Federal jurisdiction in 1934, and therefore could not have made an adverse claim to Petitioners' interest in their trust property, more than 6 years before Petitioners filed their claims on November 12, 1998.

Similarly, Petitioners' claims could not have been dismissed for lack of jurisdiction under R.C.F.C., Rule 19, since the tribe had no interest in Petitioners' trust property, having not been under Federal jurisdiction in 1934, and was therefore not a required or indispensable party.

A. *Carcieri* Precludes the Government's Erroneous Claim under the Tucker Acts' Statutes of Limitation

The government concedes that the Tucker Acts' 6 year limitation period begins to run on these claims from the government's first breach of its fiduciary duty to protect the Petitioners from any adverse claim to their beneficial ownership interest in the trust property. 28 U.S.C. §1491 and §1505; *Jones v. United States*, 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd* 801 F.2d 1334, 1335-36 (Fed. Cir. 1986).

The dismissal of Petitioners' claims for lack of jurisdiction was based upon the erroneous finding that the Petitioners' claims accrued when the tribe's constitution was adopted in 1981, more than 6 years before Petitioners' claims were filed on November 12, 1998.

However, neither the Federal Circuit nor the Court of Federal Claims explains how the tribe acquired any interest in the trust parcel by adopting a constitution that does not mention the trust parcel, particularly, when the tribe was not under Federal jurisdiction in 1934, and when the government concedes that there is "no record of the 1978 trust parcel being known as the Jamul [Indian] Village." C.A.App.429. Nor can they explain why they were not bound by this Court's holding in *Carcieri* at 1068, that the government cannot take land into trust for a recognized tribe that was not under Federal jurisdiction in 1934.

Had the Federal Circuit followed *Carcieri*, the government's breach of its fiduciary duty could not have been held to accrue when the tribe's constitution was adopted in 1981, as the government erroneously argued, since the tribe never received any interest in the Petitioners' beneficial ownership of the trust property in 1981 or any other time. The government's breach of fiduciary duty could only have occurred when the government failed to restore the Petitioners' use of the trust property, within the Tucker Acts' 6 year limitation period after November 12, 1992, when their mobile homes were destroyed.

By failing to follow *Carcieri*, the Federal Circuit and the Court of Federal Claims erroneously held that Petitioners' breach of fiduciary duty claims arose when the government claimed to have somehow transferred the trust property without a grant deed to the tribe, upon the tribe's recognition in 1981. App. 2a, 29a-31a.

However, there is no evidence of any such transfer, and the Federal Circuit's decision allows the tribe to avoid *Carcieri* and make its claim to the trust property without proving it. By employing the wrong standard of proof, the Petitioners were denied their interest in the property that was taken in trust for the individual "Jamul Indians of one-half or more Indian blood," which includes Petitioners.

There is no dispute that the Jamul Indian Village was not under Federal jurisdiction in 1934. The government concedes that the tribe was not under Federal jurisdiction until July 7, 1981, when its constitution was approved.

Similarly, there is no dispute that the deed to the trust parcel was recorded on December 27, 1978. C.A.App.425. The 1978 grant deed doesn't mention the tribe, and was recorded 4 years before the tribe was recognized by the

Executive Branch, but not Congress. C.A.App.425 and 452. The tribe's constitution identifies no territory, but that known as the Jamul Indian Village, C.A.App.442, and the government concedes that it has "no record of the 1978 trust parcel being known as the Jamul [Indian] Village." C.A.App.429.

Most importantly, there is no evidence of any subsequent transfer of the trust property to the tribe. Thus, Petitioners' claims arose when the government first failed to protect Petitioners' mobile homes from being destroyed, after November 12, 1992.

The adoption of the tribe's constitution on July 7, 1981, is the only act that the government strains to say asserted an adverse claim to Petitioners' beneficial ownership of the trust parcel, more than six years before Petitioners' claims were timely filed in 1998. However, there is no evidence in the record referring to the trust parcel as being within the tribe's constitutional jurisdiction of the Jamul Indian Village. C.A.App.429. The tribe built no structure on the trust parcel. There is no evidence that the tribe ever took any action with regard to any possession, use, or control of the trust parcel, until the Petitioners' mobile homes were wrongfully removed and the government failed to restore Petitioners' mobile homes between November 12, 1992 and November 12, 1998.

Nor is there any evidence in the record that the government or any of the individual "Jamul Indians of one-half or more Indian blood," ever transferred the individuals' beneficial ownership interest in the trust parcel to any tribe. Even though Walter Rosales held the ballot box for the adoption of the constitution as Chairman of the Election Board on May 19, 1981, there is no evidence in the record, nor any section of the Indian Reorganization Act, 25 U.S.C. §465 et seq., that provides that anyone intended the adoption of the constitution to automatically transfer the individual Indians' beneficial ownership of the trust parcel to the Indian's tribe.

There is also no evidence that any of the individual half-blood Jamul Indians ever consented to such a subsequent transfer, which is required before the government can lawfully transfer the individuals' beneficial interest in the trust property to the tribe, as recognized in *Carcieri*, at 1070, 1074-75, 1068, *Coast*, 550 F.2d 639, 644, 651, n32, *Coast*, 213 Ct. Cl. 129, 172-73, *Coast*, 578 F.2d 1391, *Assiniboine Tribe*, 690, *Miss. State Tax Comm.*, 304, and *Mem. Sol. Int.*, 668, 724, 747, and 1479.

Just as this Court has repeatedly found that courts must presume Congress says what it means, and means what it says, in a statute, *Carcieri* 1066-67, citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992), this Court also said what it means, and means what it said, when it held that the federal government cannot hold land in trust for a tribe that was not under federal jurisdiction in 1934.

Since there is no evidence in the record that the Jamul Indian Village ever lawfully acquired any interest in the trust property, the Federal Circuit's dismissal for lack of jurisdiction must be reversed, pursuant to this Court's holding in *Carcieri*. In addition, since the Federal Circuit wrongfully found that whether the tribe was under federal jurisdiction in 1934 was irrelevant, its resulting erroneous conclusion that Petitioners' claims were untimely filed, must also be reversed, because there is also no evidence in the record that the government breached its fiduciary duty to protect the Petitioners' interest in the trust property more than 6 years before Petitioners claims were filed on November 12, 1998, when they were evicted from their mobile homes.

B. *Carcieri* Precludes the Government's Rule 19 Claim that the Tribe was a Required, but Absent Party.

Had *Carcieri* been followed, Petitioners' claims also could not have been dismissed under Rule 19 of the Rules of the Court of Federal Claims, since the tribe could not have been a required party (or a "necessary and indispensable" party under the old terminology[5]), having never lawfully acquired any interest in the trust property. By failing to follow *Carcieri*, the Federal Circuit erroneously affirmed the Court of Federal Claims' refusal to exercise jurisdiction under Rule 19, based upon the government's erroneous claim that the tribe was a required, but absent party, because of the alleged, but unproven, transfer of the beneficial ownership of the trust property to the tribe, even though it was not under Federal jurisdiction in 1934.

Because this Court holds that a tribe, not under Federal jurisdiction in 1934, cannot lawfully acquire any beneficial ownership of trust property, *Carcieri* 1068, the tribe here cannot be a required party, because it is undisputed that the tribe was not under Federal jurisdiction in 1934, and therefore did not lawfully acquire any interest in the trust property in 1981, or at any other time. *Republic of Philippines v. Pimentel,* 553 U.S. 851, 867 (2008), acknowledging that an absent party may not be a required party when asserting a frivolous claim. By virtue of this Court's holding in *Carcieri,* the tribe cannot make a nonfrivolous claim to the trust property, because it is not a beneficiary in a common trust over the property. *Id.*, at 870, distinguishing conflicting claims by beneficiaries to a common trust.

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[5] As this Court acknowledged in *Republic of Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008), three relevant stylistic changes were made to Fed. R. Civ. P., Rule 19, that leave the "substance and operation of the Rule...unchanged," which were also adopted by the R.C.F.C. in 2008.

A tribe is not a "required" party in a lawsuit against the government for money damages, where it does not have a direct interest in the trust property. *United Keetoowah Band of Cherokee Indians of Okla. v. United States ("UKB"),* 480 F.3d 1318, 1326-27 (Fed. Cir. 2007); *Kansas v. United States,* 249 F.2d 1213, 1226 (10th Cir. 2001), "although the tribe had an economic interest in the suit's outcome," its gaming interest was not a sufficiently direct interest to make the tribe a required (formerly "indispensable") party; *Karuk Tribe of Cal. v. United States*, 27 Fed. Cl. 429, 431-32 (1993), denied intervention because "the interest that the applicant-interveners assert is not direct... The direct result of a judgment in favor of the plaintiff in this case would only be a monetary award from the government to the plaintiff... Here, the plaintiffs are...suing only to recover damages from the government for having excluded them from possession of the reservation."

In *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier,* 17 F.3d 1292, 1294 (10th Cir. 1994), the United States failed to show that the Absentee-Shawnee tribe had a "legally protected interest," since the tribe had never been granted an "undivided trust or restricted interest" in the land; *Yellowstone County v. Pease,* 96 F.3d 1169, 1172 (9th Cir. 1996)(same). A "legally protected interest" excludes those "claimed" interests that are "patently frivolous." *UKB*, at 1325, quoting *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992). Thus, the Federal Circuit's decision also conflicts with these Circuit definitions of what constitutes a sufficiently direct legally protected interest, and when a tribe's alleged interest was patently never acquired.

Moreover, the Federal Circuit was not entitled to affirm the Court of Federal Claims' refusal to exercise jurisdiction under R.C.F.C., Rule 19 on the basis of issue preclusion, App.2a, 33a, for two reasons. First, the dismissals in *Rosales VII* and *IX*,[6] due to an absent required party under Rule 19 were without prejudice, and therefore not adjudications on the merits. *Costello v. United States*, 365 U.S. 265, 286-87 (1961), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866). Second, this Court fundamentally changed the law concerning beneficial ownership of Indian trust property in *Carcieri*, thereby precluding the application of issue preclusion, since Petitioners' claims were based upon new facts, arising from the government's subsequent breaches of its fiduciary duty, all of which occurred following the

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[6] These cases, *Rosales v. United States ("Rosales VII")*, No. 01-951 (S.D. Cal. Feb. 14, 2002) (*"Rosales VII"*), *aff'd on other grounds*, 73 F.Appx. 913 (9th Cir. 2003); *Rosales v. United States* (*"Rosales IX"*), No. 07-624, 2007 WL 4233060 (S.D. Cal. 2007), *appeal dismissed*, No. 08-55027 (9th Cir. Aug. 12, 2009), are referred to in the same manner as the Court of Federal Claims' decision, App.9a, fn.2.

Petitioners' single claim for a trust patent in *Rosales VII*, and the personal injury claims in *Rosales IX*. *Bobby v. Bies*, 129 S.Ct. 2145, 2152-53 (2009); *Montana v. United States*, 440 U.S. 147, 162 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948).

This Court clearly sets out *Carcieri*'s fundamental change in the law, and alteration of the government's erroneous practice for 75 years to take land into trust for many of the 306 tribes that were "not under Federal jurisdiction" in 1934. *Carcieri* at 1065, "the Secretary's current interpretation is at odds with the Executive Branch's construction of this provision at the time of enactment."

Now that this Court has fundamentally changed the law, and holds that the government cannot hold land in trust for a tribe that was "not under Federal jurisdiction" in 1934, since the Jamul Indian Village was "not under federal jurisdiction," and did not exist in 1934, the Jamul Indian Village never acquired a beneficial ownership interest in the trust parcel, at any time. The parcel was only taken into trust for individual "half-blood Jamul Indians," including the Petitioners, who have never transferred that interest to the tribe.

Nor does the tribe have a "legally protected interest" in the Petitioners' claims for money damages, as in *UKB*, caused when their beneficial interest in the trust parcel was taken at the point of a gun, and their homes were bulldozed without compensation. Therefore, the tribe is neither a "required" party, under R.C.F.C. Rule 19, as amended, nor a "necessary and indispensable" party, under the former Rule 19, and the Federal Circuit and Court of Claims' dismissal under Rule19, must be reversed.

2. The Federal Circuit's Decision Conflicts with the District of Columbia Circuit's Decision in *Patchak v. Salazar.*

The Federal Circuit's decision also conflicts with *Patchak v. Salazar*, No. 09-5324, 2011 WL 192495 (D.C. Cir. 2011), which follows *Carcieri*, and holds that a court must determine whether a tribe was under Federal jurisdiction in 1934, in determining jurisdiction over the Petitioners' claims that the tribe did not acquire any interest in the trust property, since the government cannot hold property in trust for a tribe that was not under Federal jurisdiction in 1934. *Id.*, at *3.

Here, the Federal Circuit should not be permitted to dismiss Petitioners' claims without a trial, and without deciding whether the tribe lawfully acquired any interest in the trust property, in conflict with *Carcieri* and *Patchak*, because it is undisputed that the tribe was not under Federal jurisdiction in 1934. *Devlin v. Scardalletti*, 536 U.S. 1, 6 (2002), *certiorari* is granted where there is disagreement among circuits as to an important federal question.

3. Whether a Tribe has Lawfully Acquired an Interest in Trust Property is an Important Federal Question

The Federal Circuit's decision, as does *Carcieri*, affects the members of as many as 306 tribes that were not under Federal jurisdiction in 1934,[7] 54% of all federally recognized tribes throughout the nation, and the approximate 930,000 non-Indian and Indian citizens who reside on the remainder of 48 million acres of Indian trust property in nearly all of the states,[8] 500,000 of whom are individual beneficial owners of such property,[9] as are Petitioners here.

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[7] Compare, Commissioner of Indian Affairs John Collier's list of 258 tribes under Federal jurisdiction in 1934, acknowledged by Justice Breyer in *Carcieri* at 1069, with the current list of 564 tribes at 74 Fed. Reg. 40,218 (2009).

If the government and the tribe are allowed to avoid the holding in *Carcieri*, whenever a tribe claims an interest in trust property adverse to Petitioners' beneficial interest in that property, by employing the wrong legal standard to have Petitioners' claims dismissed for lack of jurisdiction, any of the 306 tribes not under Federal jurisdiction in 1934 may avoid *Carcieri*, by similarly having the courts use the wrong standard as to whether the tribe was under Federal jurisdiction in 1934, and thereby divest the states of their sovereignty over such property and thousands of beneficial property owners of their individual ownership interests.

By failing to abide by this Court's decision in *Carcieri*, and affirming the Court of Federal Claims' dismissal of Petitioners' claims without even citing *Carcieri*, the Federal Circuit has allowed any of the 306 tribes not under Federal jurisdiction to claim that they acquired an interest in a state's property more than 6 years ago, and thereby preclude the true individual owners from having the merits of their beneficial ownership determined.

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[8] Brief of the States of Arizona, Nevada, New Mexico, South Dakota, Utah, Washington, and Wyoming in Support of Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408 (1989) (Nos. 87-1622, 87-1697 & 87-1711), 1987 WL 880161; and Brief of the National Association of Counties as Amicus Curiae in Support of the Petition for a Writ of Certiorari, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408 (1989) (Nos.87-1622, 87-1697 & 87-1711), 1987 WL 880371; and *Cohen's Handbook of Federal Indian Law* §1.04, p. 82 (2005).

[9] *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (Fed. Cl. 2004).

However, that is not the law, as decided by this Court in *Carcieri*, and followed in *Patchak*. Whenever a tribe claims an interest in trust property adverse to a state or an individual's interest in the trust property, this Court must require all courts to determine whether a tribe was under Federal jurisdiction in 1934, particularly when determining the timeliness of Petitioners' claims that the tribe never acquired an interest in the trust property. Otherwise, any of the 306 tribes not under Federal jurisdiction in 1934 will be allowed to merely assert such an interest, and shield the falsity of their claim from a proper determination on the merits, as happened here.

Following *Carcieri*, the government must remain liable for breaching its most exacting of fiduciary duties and failing to protect the Petitioners' interest in their trust property from erroneous claims by a tribe not under Federal jurisdiction in 1934, that this Court now holds has no interest in the trust property. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Mason*, 412 U.S. 391, 398 (1973); *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 226, fn. 31 (1983), citing *Coast*, at 652; *Jones v. United States*, 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd*, 801 F.2d 1334 (Fed. Cir. 1986).

Even though the Federal Circuit's decision is labeled nonprecedential, such a label does not hide the split in the Circuits, nor an error in conflict with this Court's decisions. Affirming an erroneous decision that failed to comply with this Court's decision in *Carcieri*, without correcting the error, leaves that *ratio decidendi* to be used by any of the 306 tribes not under Federal jurisdiction in 1934 to continue to erroneously claim an interest in trust property, that this Court holds was never acquired. Such nonuniformity in conflict with this Court's holding in *Carcieri* must not be perpetuated.

"With the increased use of unpublished and summary decisions in federal and state intermediate appellate courts...the Court grants *certiorari* to review unpublished and summary decisions with some frequency. See *Kane v. Garcia Espitia*, 126 S.Ct. 407 (2005); *Dye v. Hofbauer*, 126 S.Ct. 5 (2005); *Illinois v. Fisher*, 540 U.S. 1174 (2004); *United States v. Flores-Montano*, 541 U.S. 149 (2004)." Eugene Gressman, *Supreme Court Practice*, §4.11, p.263 (2007). As noted by Justice Stevens, unpublished decisions require greater scrutiny, because "occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify." Jeffrey Cole & Elaine Bucklo, *A Life Well Lived: An Interview With Justice John Paul Stevens*, 32 Litigation 8, 67 (Spring 2006).

As noted by Circuit Judge Davis in this era of electronic publication of all decisions, whether labeled nonprecedential or not: "we provide an incentive to counsel...to cite to the district courts the full panoply" of prior cases, leaving the trial court to select "whatever doctrine fits the court's fancy, whether or not correct under settled law." *Riley v. Dozer Internet Law PC*, 377 Fed.Appx. 399, 410-11 (4th Cir. 2010)(J. Davis, dissenting). Hence, nonprecedential cases in conflict with this Court's decisions must still be affirmatively overruled to secure national rights and the uniformity of judgments.

CONCLUSION

Therefore, *certiorari* should be granted to allow this Court to resolve the split among the Circuits, and to prevent a procedural end run of its holding in *Carcieri*. A tribe must first be determined to have been under Federal jurisdiction in 1934, before a court may properly resolve a dispute among the state and Federal governments, individual Indians, and the tribe, as to the beneficial ownership of trust property anywhere in the nation.

After losing their homes at gunpoint, due to an unfortunate string of judicial errors employing the wrong legal standard to dismiss Petitioners' claims for lack of jurisdiction, Petitioners remain entitled to a decision on the merits, enforcing the law of the land as decided by this Court in *Carcieri*, which bars the tribe's claims to any interest in the trust parcel.

Respectfully submitted

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DECIDED SEPTEMBER 17, 2010

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

WALTER ROSALES AND KAREN TOGGERY,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

2010-5028

Appeal from the United States Court of Federal Claims in cases nos. 08-CV-512, and 98-860, Judge Lawrence J. Block.

Decided: September 17, 2010

PATRICK D. WEBB, Webb & Carey APC, of San Diego, California, argued for plaintiffs-appellants.

ROBERT P. STOCKMAN, Attorney, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief was IGNACIA S. MORENO, Assistant Attorney General.

Before RADER, *Chief Judge*, FRIEDMAN, and LINN, *Circuit Judges*.

PER CURIAM.

The judgment of the United States Court of Federal Claims, dismissing the two complaints here at issue for lack of jurisdiction, is affirmed, primarily on the basis of the opinion of that court, dated October 14, 2009, and reported at 89 Fed. Cl. 565 (2009), with the following additional statement:

The appellants contend that the decision of the Supreme Court in *Carcieri v. Salazar*, 555 U.S. ----, 129 S. Ct. 1058 (2009), controls this case and requires reversal of the Court of Federal Claim's decision. *Carcieri*, however, has nothing to do with the present case.

Both *Carcieri* and the present case involve the Indian Reorganization Act of 1934 (the "Act"), which authorizes the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465; *see Carcieri*, 129 S. Ct. at 1060. The Act states that, as there used, "[t]he term 'Indian'" "include[s]" three different categories. *See* 25 U.S.C. § 479. *Carcieri* dealt with the first of those categories: "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* The only issue before the Court in *Carcieri*, and the only one it "decide[d]," was "whether the word[s] 'now under Federal jurisdiction' refer[red] to 1998, when the Secretary accepted the . . . parcel into trust, or 1934, when Congress enacted the [Act]." *Carcieri*, 129 S. Ct. at 1064. The Court held that "now" meant 1934, the enactment date.

The present case, however, involves the third statutory category of "Indian": "all other persons of one-half or more Indian blood." *See* 25 U.S.C. § 479. Here the Secretary accepted the disputed land for the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." *Carcieri* decided nothing about this "one-half or more" provision. *See Carcieri*, 129 S. Ct. at 1070 (Breyer, J., concurring) ("Neither the Narragansett Tribe nor the Secretary has argued . . . . that any member of the Narragansett Tribe satisfies the 'one-half or more Indian blood' requirement"). Moreover, *Carcieri* dealt only with the merits of the statutory issue—the meaning of "now under federal jurisdiction." The only question in the present case, however, is whether the Court of Federal Claims correctly held that it lacked jurisdiction over the two complaints it dismissed for lack thereof. That court decided nothing relating to the "now under Federal jurisdiction" provision.

The appellants rely on expansive language in *Carcieri*. As this court has noted, however, "[b]road statements in judicial opinions must be interpreted in light of the issue before the court, and cannot uncritically be extended to significantly different situations." *Perez v. Dep't of Justice*, 480 F.3d 1309, 1312 (Fed. Cir. 2007). The Supreme Court's broad statements in *Carcieri*, made in determining the meaning of the statutory term "now," cannot be applied or extended to cover the jurisdictional issue we decide.

APPENDIX B — ORDER DENYING COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DATED DECEMBER 8, 2010

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2010-5028

WALTER ROSALES and KAREN TOGGERY,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in case no. 08-CV-512, Judge Lawrence J. Block.

ORDER

NOTE: This order is nonprecedential.

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellants, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 15, 2010.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 12/08/2010

cc: Patrick D. Webb
Robert P. Stockman

ROSALES V US, 2010-5028
(CFC - 08-CV-512)

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS, DATED OCTOBER 14, 2009

In the United States Court of Federal Claims

Nos. 08-512 L & 98-860 L

WALTER J. ROSALES AND KAREN TOGGERY,

and

WALTER J. ROSALES, ET AL.,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's Published Opinion and Order, filed October 7, 2009,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the Amended Complaint in 08-512 L is dismissed, and the Third Amended Complaint in 98-860 L is dismissed. Costs to defendant.

Hazel Keahey
Clerk of Court

October 14, 2009

By: /s/Lisa L. Reyes
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of *all plaintiffs*. Filing fee is $455.00.

APPENDIX D — PUBLISHED OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS, DATED OCTOBER 7, 2009

United States Court of Federal Claims

October 7, 2009

Statute of Limitations; Issue Preclusion; RCFC 19; Necessary and Indispensable Party; Indian Trust Accounting Statute; Continuing Claims Doctrine; Sovereign Immunity; Subject Matter Jurisdiction

No. 08-512 L

Walter J. Rosales and Karen Toggery,

Plaintiffs,

v.

United States of America,

Defendant.

No. 98-860 L

Walter J. Rosales, *et al.*,

Plaintiffs,

v.

United States of America,

Defendant.

Patrick D. Webb, Webb & Carey, San Diego, CA, for plaintiffs.

Samantha Klein, Natural Resources Section, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

Block, *Judge*.

Two cases before this court, *Walter J. Rosales and Karen Toggery v. United States*, No. 08-512 L ("*Rosales X*"), and *Walter Rosales, et al. v. United States*, No. 98-860 L ("*Rosales VI*"), arise out of a common set of facts and implicate similar principles of law. For the purposes of judicial economy, the court addresses both cases in this single opinion.

Both cases stem from internecine disputes among the members and purported members of the Jamul Indian Village ("Village"), a federally-recognized tribal government.[1] The two complaints before this court, in *Rosales VI* and *Rosales X*, represent but the most iterations of plaintiffs' persistent attempts—in the face of repeated dismissals and unfavorable judgments over the course of fifteen years—to invalidate a series of tribal elections and to wrest from the Village the beneficial ownership of two parcels of tribal land. Plaintiffs have litigated or sought to litigate these same and related issues in no fewer than fourteen legal actions brought before tribal tribunals, administrative boards, and federal courts in California and the District of Columbia, all without success.[2] Indeed, what this court previously observed in

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[1] The court will use "Village" to refer to the recognized government of the Jamul Indians and "Tribe" to refer to the Jamul Indians as an organized group.

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[2] The first round of litigation comprised administrative challenges, before the Department of the Interior Board of Indian Appeals ("IBIA"), concerning various Village elections, electoral procedures, and membership eligibility. These cases are: (1) *Rosales v. Sacramento Area Dir.* (*"Rosales I"*), 32 I.B.I.A. 158 (1998); (2) *Rosales v. Sacramento Area Dir.* (*"Rosales II"*), 34 I.B.I.A. 50 (1999); (3) *Rosales v. Sacramento Area Dir.* (*"Rosales III"*), 34 I.B.I.A. 125 (1999); and (4) *Rosales v. Sacramento Area Dir.* (*"Rosales IV"*), 39 I.B.I.A. 12 (2003).

Contemporaneously, plaintiffs brought challenges in federal courts, seeking review of various matters relating to the election disputes at issue in *Rosales I–IV.* These cases are: (5) *Jamul Indian Vill. v. Hunter*, No. 95-131 (S.D. Cal. voluntarily dismissed Sept. 30, 1996) (seeking to enforce a "judgment" from the "tribal court" of a faction of the Tribe that had lost in tribal elections); (6) *Rosales v. Townsend* (*"Rosales V"*), No. 97-769 (S.D. Cal. voluntarily dismissed Nov. 19, 1998); and (7) *Rosales v. United States* (*"Rosales VIII"*), 477 F. Supp. 2d 119 (D.D.C. 2007) (granting defendant's motion for summary judgment, and upholding IBIA's decisions in *Rosales I–IV*), *aff'd*, 275 F. App'x 1 (D.C. Cir. 2008).

In their most recent round of litigation, plaintiffs sought to secure beneficial ownership of several parcels of land that the Village has claimed. These cases are: (8) *Rosales VI*; (9) *Rosales v. United States*, No. 01-951 (S.D. Cal. Feb. 14, 2002) (*"Rosales VII"*), *aff'd on other grounds*, 73 F. App'x 913 (9th Cir. 2003) (*"Rosales VII Affirmance"*), *cert. denied*, 541 U.S. 936 (2004); (10) *Rosales v. United States* (*"Rosales IX"*), No. 07-624, 2007 WL 4233060

Franklin Sav. Corp. v. United States, 56 Fed. Cl. 720, 721 (2003), seems doubly apt here: "Despite vainly prosecuting myriad legal claims in every conceivable forum and fruitlessly propounding inventive and novel legal theories, plaintiffs have continually stared down the face of defeat, personifying Mason Cooley's aphorism, 'if you at first don't succeed, try again, and then try something else.'"

(S.D. Cal. 2007), *appeal dismissed for failure to prosecute*, No. 08-55027 (9th Cir. Aug. 12, 2009); and (11) *Rosales X*. As noted, *Rosales VI* and *Rosales X* are the subjects of the instant opinion.

Additionally, there are several cases which arise out of the same set of facts, but are tangential to the issues before this court. Plaintiffs' counsel in this case also filed a challenge to the Village's casino gaming plan in (12) *Rosales v. Kean Argovitz Resorts, Inc.*, No. 00-1910 (S.D. Cal. Apr. 18, 2001), *aff'd*, 35 F. App'x 562 (9th Cir. 2002), *cert. denied*, 537 U.S. 975 (2002). In parallel with *Jamul Indian Vill. v. Hunter*, plaintiffs' counsel filed (13) *Jamul Indian Vill. v. Sacramento Area Dir.*, 29 I.B.I.A. 90 (1996), purportedly on behalf of the Jamul Indian Village, but IBIA rejected that appeal as premature and procedurally deficient, *id.* at 90–91. Finally, IBIA also summarily dismissed a case that Walter Rosales and Marie Toggery filed, along with San Diego County and the Board of Directors of the San Diego Rural Fire Protection District, (14) *San Diego Cty. v. Pac. Reg'l Dir.*, 37 I.B.I.A. 233 (2002). In that case, the appellants sought review of a Finding of No Significant Impact ("FONSI"), made by the Pacific Regional Director of the Bureau of Indian Affairs, as to the proposed acquisition of approximately 101 acres of land for the Village pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321–70. *Id.* at 233. Because the Regional Director indicated that the Bureau of Indian Affairs was withdrawing its FONSI in favor of a full Environmental Impact Statement, IBIA dismissed the case as moot. *See id.* at 233–34.

Plaintiffs' current attempt to defy their fate—an attempt this court strongly admonishes plaintiffs to make their last—miscarries again.

The court hereby grants defendant's motion to dismiss the complaint in *Rosales X*, and dismisses, on its own motion, the complaint in *Rosales VI*.

I. BACKGROUND

The Village is a tribal governmental entity of the Kumeyaay Indians, which Congress recognized[3] pursuant to section 16 of the Indian Reorganization Act ("IRA") of 1934, 25 U.S.C. § 476. *Rosales VIII* at 122. The Village is located in Jamul, an unincorporated community in San Diego County, California. *See id.* The Village came into being in 1981, after twenty individuals petitioned the Bureau of Indian Affairs to organize as a community of "half-bloods"[4] pursuant to IRA and submitted a proposed "Village Constitution."[5] *See id.* (citing *Rosales I* at 159–60). Of the twenty-three individuals eligible to vote on the proposed Constitution, sixteen did so, all in favor. *Id.* (citing *Rosales I* at 160). The Acting Deputy Assistant Secretary of Indian Affairs approved the Village Constitution on July 7, 1981. *Id.* This original constitution made tribal membership available only to individuals with no less than "1/2 degree California Indian blood quantum." *Id.*

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[3] "Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society and institutionalizing the government-to-government relationship between the tribe and the federal government." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (2005). That recognition creates a fiduciary relationship between the government and the tribe, formalizes the tribe's power to tax and to establish its own judiciary, and determines the tribe's eligibility for the congressionally-created programs and services that the Department of the Interior's Bureau of Indian Affairs provides. *See id.*; *see generally* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271 (2001).

Plaintiffs in *Rosales X*, Walter Rosales and Karen Toggery, are Native American residents of San Diego County, California, of one-half or more degree of California Indian blood. *Rosales X*, Compl. ¶ 1. Of the twelve plaintiffs named in the original complaint in *Rosales VI*, only two remain, Joe Comacho (also a Native American resident of San Diego County, *Rosales VI*, 3d Am. Compl. ¶ 1) and Walter Rosales; all other named plaintiffs have either died or withdrawn consent for suit since counsel filed the original complaint.[6]

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[4] Section 19 of IRA, 25 U.S.C. § 479, defines the term "Indian" to include "all other persons of one-half or more Indian blood." In reviewing a tribal constitution, the Department of the Interior has historically sought to exclude from tribal membership "a large number of applicants with a small degree of Indian blood." *See* Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 Am. Indian L. Rev. 243, 262–69 (2009) (explaining the history and application of the Indian "blood quantum" and its role in tribal membership).

[5] Section 16 of IRA, 25 U.S.C. § 476, details the procedures for an Indian tribe to organize as a political unit and to establish the rules for its self-governance.

A. *The Underlying Dispute*

The path to the instant cases began in 1994, when a faction led by then Vice-Chairman Jane Dumas ("Dumas Faction") held an election to recall and replace four Village officials[7] who had been elected in 1992 ("Incumbent Faction"). *Rosales VIII* at 122–23. The Superintendent and Area Director of the Bureau of Indian Affairs ("the Bureau") refused to uphold the 1994 recall election because the Dumas Faction had failed to comply with the Village Constitution's procedural requirements. *Id.* at 123 (citing *Rosales I* at 160). Had the Bureau upheld the recall election, plaintiff Karen Toggery would have been the Secretary-Treasurer of the Village. *Id.* at 123 n.3. Instead, the Bureau continued to recognize the Incumbent Faction. *Id.* at 123. In 1995, each faction held its own separate election, and, as a result of its respective contest, claimed to have the authority to lead the Village. *Id.* The Dumas Faction's disputes of the 1994 and 1995 elections trickled through the Department of the Interior's administrative review process, ultimately coming before the Department of the Interior Board of Indian Appeals ("IBIA"). *Rosales I* at 158–59. IBIA could not determine whether either faction's 1995 election was valid, thus leaving the Incumbent Faction in control, because the 1992 election that had brought them to power was the most recent unchallenged election. *Rosales VIII* at 123; *Rosales I* at 167.

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[6] Six of the original plaintiffs revoked permission for the attorney of record, Patrick D. Webb, to represent them in any pending litigation; five of those stated that they had *never* authorized Webb to represent them. *Rosales VI*, Updated Mot. to Dismiss, Ex. 11, Declaration of Kenneth Meza ("Meza Decl."), Ex. B. Another two plaintiffs withdrew from the litigation. *Id.* Kenneth Meza, the elected Tribal Chairman of Jamul Indian Village, has stated that five of the original plaintiffs are now deceased: Marie Toggery, along with four (Sarah Aldamas, Vivian Flores, Valentino Mesa, William Mesa) of the six plaintiffs who had previously revoked their permission for Webb to represent them. Meza Decl. ¶ 7. Finally, a tenth plaintiff, Bernice Mesa, is not named in the Third Amended Complaint submitted by plaintiffs in June of this year; the court presumes that Mesa, too, has either withdrawn from the suit or passed away. Plaintiffs seek leave to substitute Karen Toggery for Marie Toggery (Karen is Marie's daughter and the personal representative of Marie's estate), arguing that the Federal Circuit has held that the court should be lenient in permitting substitution. *Rosales VI*, Pls.' June Mot. at 9–10 (citing *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999)). While the ninety-day window to move for substitution may not yet have expired, *see Grass Valley Terrace v. United States*, 69 Fed. Cl. 506, 509 (2006), plaintiffs have not formally moved for substitution, as RCFC 5 and RCFC 25(a)(3) require, so this court need not consider whether it should allow the substitution.

The Dumas Faction, including Mr. Rosales, Ms. Toggery, and others, continued to challenge tribal election results at IBIA. Next, they contested the propriety of the Village's 1996 "secretarial" election, concerning a proposed amendment to the Village Constitution that would reduce the blood quantum requirement for Village membership from one-half to one-quarter. *See Rosales II*, 34 I.B.I.A. at 51–52. The Village had voted in favor of, and the Deputy Commissioner of Indian Affairs had ultimately approved, that amendment. *Id.* IBIA dismissed the Dumas Faction's challenge for being procedurally defective, *see id.* at 51–54, evidently to plaintiffs' profound dismay.

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[7] These officials are Raymond Hunter, Marcia Goring-Gomez, Mary Alveraz, and Lee Shaw-Conway. *Rosales I* at 161.

Plaintiffs' grievance over the results of these tribal elections, in particular, the lowered blood quantum requirement for Village membership and plaintiffs' exclusion from membership in the Village (i.e., the tribal government), would set off what is now a fifteen-year campaign of legal challenges.

In their suits against defendant United States, plaintiffs have advanced two theories for relief, alleging defendant's breach of various fiduciary and trust duties. The first theory is founded upon plaintiffs' challenge to the validity of tribal elections and the legitimacy of the current Village membership, while the second rests upon plaintiffs' claim to beneficial ownership of two parcels of tribal land. The various complaints and amended complaints filed in the two cases before this court have invoked both theories for relief.

B. *The Instant Litigation*

1. *Rosales v. United States*, No. 08-512 (*"Rosales X"*)

Before the court are two iterations of plaintiffs' complaint: the original complaint, filed on July 15, 2008, and a proposed Amended Complaint, filed on June 24, 2009 along with plaintiffs' pending motion to amend and to consolidate this case with *Rosales VI*. *Rosales X*, Pls.' June 24, 2009 Mot. to Amend. ("Pls.' June Mot."). The Amended Complaint adds nine pages (and nine numbered paragraphs), but is *substantively identical* to the original complaint (compare concurrent citations below).

Plaintiffs' *Rosales X* claims focus on two parcels of tribal land. *See, e.g.*, *Rosales X*, Compl. ¶¶ 69, 74 (stating the primary basis for plaintiffs' two claims for relief); Am. Compl. ¶¶ 78, 83 (same). The first of these, a parcel of land currently designated 597-080-04 ("Parcel 04"), is the 4.66-acre portion of the original Mexican land grant of Rancho Jamul that Donald and Lawrence Daley conveyed, in 1978, to "'[t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate.'" *See Rosales X*, Compl. ¶ 11, Ex. D (the 1978 Deed); Am. Compl. ¶ 13. The other parcel, designated 597-080-05 ("Parcel 05"), comprises 1.372 acres of an original 2.21-acre plot of land that the Roman Catholic Bishop of San Diego conveyed on July 27, 1982, "to the United States of America in trust for the Jamul Indian Village." *See Rosales X*, Compl. ¶ 21, Ex. F (the 1982 Deed); Am. Compl. ¶ 24. The remaining 0.838 acres of that 2.21-acre plot, designated 597-080-06 ("Parcel 06"), remains the property of the Bishopric and is not at issue in either case. *See Rosales X*, Compl. ¶ 22; Am. Compl. ¶ 25.

Plaintiffs in *Rosales X* assert that they, not the Village, are the rightful beneficial owners of Parcels 04 and 05. *See Rosales X*, Compl. ¶ 69 and Am. Compl. ¶ 74 (claiming that defendant breached its duties to plaintiffs by "failing to enforce the deed to, and Plaintiffs' beneficial ownership of, [Parcels 04 and 05]"); *Rosales X*, Compl. ¶¶ 74–76 and Am. Compl. ¶¶ 83–85 (claiming that this same failure effected a taking). Plaintiffs previously made the same assertions in *Rosales IX*. *See Rosales IX* at *4 (discussing plaintiffs' underlying assertion of their beneficial ownership interest in Parcel 04). Echoing *Rosales IX*, plaintiffs also argue that the federal government has duties, under the Native American Graves Protection and Repatriation Act ("NAGPRA"),[8] to prevent inadvertent discoveries of human remains on those parcels of land, Parcels 04 and 05 among them, where Native American remains and funerary objects exist. *Compare Rosales X*, Compl. ¶ 63(4)–(10) *and* Am. Compl. ¶ 71(4)–(10) (setting forth plaintiffs' NAGPRA allegations) *with Rosales IX* at *8–*10 (rejecting plaintiffs' arguments that NAGPRA imposes has any such affirmative duties upon the federal government). Plaintiffs assert that defendant violated these duties—duties allegedly owed to them as the beneficial owners of Parcels 04 and 05—primairly by failing to prevent the Village's grading of, and other construction activity on, the land. *Rosales X*, Compl. ¶ 63(4); Am. Compl. ¶ 71(4). Based on a panoply of statutes, including IRA and NAGPRA, plaintiffs allege that defendant breached its fiduciary and common law trust duties to manage Indian affairs (1) by failing to enforce plaintiffs' claims of, and rights to, beneficial ownership of Parcels 04 and 05, (2) by failing to prevent interference with the graves therein, and (3) by failing to prevent plaintiffs' eviction from these parcels. *Rosales X*, Compl. ¶¶ 67, 69; Am. Compl. ¶¶ 76, 78. Plaintiffs also charge that, through this allegedly unlawful inaction, defendant effected a taking of Parcels 04 and 05 without compensation, in violation of the Fifth Amendment. *Rosales X*, Compl. ¶¶ 74–76; Am. Compl. ¶¶ 83–85. Finally, plaintiffs claim that IRA and NAGPRA taken together constitute a money-mandating source, sufficient to invoke this court's jurisdiction.[9] *Rosales*

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[8] Codified, in pertinent part, at 25 U.S.C. §§ 3001–3013, NAGPRA lays out federal agencies' procedures and obligations when Native American human remains or associated funerary objects are discovered. *See Rosales IX* at *2 n.3. NAGPRA also sets forth the responsibilities of museums and federal agencies that controlled such remains or objects before NAGPRA became law. *Id.*

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[9] According to the "the network theory" of jurisdiction under the Tucker Act and Indian Tucker Act, a meshwork of statutes and regulations may, under some circumstances, substitute for a clear money-mandating statute. *See United States v. Navajo Nation* ("*Navajo Nation I*"), 537 U.S. 488, 504–06 (2003) (explaining that a network of statutes and regulations can satisfy this court's Indian Tucker Act jurisdiction when the "network" establishes specific rights and duties that go beyond a general trust relationship); *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 61–66 (2008) (recounting the history of the network theory and explaining that a network of statutes may satisfy this court's jurisdictional requirement of a money-mandating source when the network establishes a fiduciary relationship between the government and an Indian tribe). However, *Navajo Nation I* foreclosed the application of this theory in most cases, by requiring that a plaintiff identify "*specific* rights-creating or duty-imposing statutory or regulatory prescriptions" in place of a clear money-mandating statute. 537 U.S. at 506 (emphasis added); *see United States v. Navajo Nation* ("*Navajo Nation II*"), _ U.S. _, 129 S. Ct. 1547, 1554–55 (2009) (explaining that *Navajo Nation I* foreclosed application of the network theory where the statutes comprising the network only created an implied duty).

X, Pls.' Mem. in Opp'n to Def.'s Mot. to Dismiss ("Pls.' Opp'n.") at 6.

Defendant has moved to dismiss the original complaint for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the RULES OF THE COURT OF FEDERAL CLAIMS ("RCFC"). *Rosales X*, Mot. to Dismiss at 10–14. Defendant identifies plaintiffs' failure to bring their claims within the Tucker Act's six-year statute of limitations as a jurisdictional defect mandating dismissal. *Id.* In addition, defendant argues that the Village, whose joinder is barred by sovereign immunity, is a necessary and indispensable party to the adjudication of plaintiffs' claims, and that issue preclusion bars plaintiffs from relitigating that threshold issue, which has been fully litigated and previously ruled upon by the *Rosales IX* court. *Rosales X*, Mot. to Dismiss at 14–21.[10] Defendant has also moved to strike plaintiffs' motion to amend (along with the proposed Amended Complaint). *Rosales X*, Def.'s July 7, 2009 Mot. to Strike Pls.' Mot. to Amend.

2. ***Rosales v. United States*, No. 98-860 ("*Rosales VI*")**

After losing its election challenge in *Rosales I*, and in an apparent attempt to attack that decision collaterally, the Dumas Faction brought suit in this court, filing the first *Rosales VI* complaint in 1998.[11] More than a decade and several amendments later,[12] the court has before it two wholly divergent incarnations of plaintiffs' complaint.

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[10] In the alternative, defendant has moved to dismiss for failure to state a claim, pursuant to RCRC 12(b)(6), but, curiously, does not cite RCFC 12(b)(7) (which permits dismissal for failure to join a party under Rule 19).

The Second Amended Complaint, the last amendment filed with the court's leave, essentially continues the election challenges first launched in *Rosales I.* Plaintiffs claim that defendant breached its trust responsibilities by "dealing with non-members of JAMUL as if they were, in fact, members of JAMUL, and by independently and in conspiracy with the NON-MEMBERS,[13] violating the Jamul Constitution and ordinances." *Rosales VI*, 2d Am. Compl. ¶ 41. The complaint also challenges defendant's recognition of the Incumbent Faction, *see id.* ¶ 19 (complaining of the purported NON-MEMBERS' receipt of federal funding and benefits), its "funding and facilitating . . . [the] staging of an illegal election for an illegal amendment to the JAMUL INDIAN VILLAGE Constitution," *id.* ¶ 20 (referring to the 1996 secretarial election), and state and federal law enforcement officials' treatment of the Incumbent Faction as the lawful tribal government, *see id.* ¶ 26. The source of all of these charges is the series of Village elections that the Dumas Faction lost, along with IBIA's refusal in *Rosales I–IV* to overturn them. *See id.* ¶¶ 24–25 (asserting the validity of the Dumas Faction's tribal court judgments, despite the unambiguous language of *Rosales III* to the contrary). Defendant has moved to dismiss the Second Amended Complaint, on jurisdictional and justiciability grounds, notably, plaintiffs' lack of standing to bring suit either individually or on behalf of the Jamul Tribe. *Rosales VI*, Updated Mot. to Dismiss at 14–27.

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[11] Plaintiffs' counsel, Patrick D. Webb, filed *Rosales VI* despite not being admitted to this court's bar at the time. *See Rosales VI*, Compl. at 1; *Rosales VI*, Defect Slip, Mar. 17, 1999 (stating that the complaint did not comply with RCFC 81(d)(1) because Mr. Webb was not admitted to this court's bar).

[12] The court first stayed *Rosales VI* from April 19, 2000 through February 26, 2004, and ordered the parties to file a joint status report following the conclusion of *Rosales IV. Rosales VI*, Docket No. 39 (Order of Apr. 19, 2000 Granting Stay) & Docket No. 40 (Order of Feb. 26, 2004). The court stayed *Rosales VI* a second time, from March 19, 2004 through September 26, 2008, at the parties' request, pending the outcome of *Rosales VIII. Rosales VI*, Docket No. 43 (Order of Mar. 19, 2004 Granting Parties' Stay Request); Order of Sept. 26, 2008 Lifting Stay. Then-Chief Judge Damich transferred *Rosales VI* to this judge on September 26, 2008. *Rosales VI*, Docket No. 75 (Order Transferring Case).

[13] These styled "NON-MEMBERS" include the four members of the Incumbent Faction whose recall was at issue in *Rosales I. Compare* note 7, *supra* (listing the officials at issue), *with Rosales VI*, 2d Am. Compl. ¶ 7 (including those same officials in the list of "NON-MEMBERS"). *See also id.* ¶ 9 (alleging that the "NON-MEMBERS" have never been enrolled members of the Village).

On March 6, 2009, plaintiffs filed a memorandum, opposing defendant's updated motion to dismiss and seeking to consolidate this case with *Rosales X*, along with an eleven-page exhibit purporting to be a Third Amended Complaint. *Rosales VI*, Pls.' Mem. in Opp'n to Def.'s Updated Mot. to Dismiss ("Pls.' Opp'n.") at 2; Ex. A. In their memorandum, plaintiffs "voluntarily dismiss[ed] those portions of their Second Amended Complaint not contained in their proposed Third Amended Complaint." *Rosales VI*, Pls.' Opp'n. at 2. On June 24, 2009—the same day they filed their *Rosales X* motion to amend—

plaintiffs filed a formal motion to amend the complaint in *Rosales VI*, along with an expanded, 41-page iteration of their Third Amended Complaint. *Rosales VI*, Pls.' June 24, 2009 Mot. to Amend. ("Pls.' June Mot."). Plaintiffs' *Rosales VI* June motion reiterates their abandonment of the elections-based claims, stating that, "[a]s pleaded in the proposed [third] amended complaint, Plaintiffs no longer make claims based upon their being the lawfully elected leaders of the tribe. Nor do they make claims for injury to tribal property, tribal assets, or any tribal interests." *Rosales VI*, Pls.' June Mot. at 4. Instead, in an apparent attempt to sidestep defendant's updated motion for dismissal and to start this case anew, plaintiffs' Third Amended Complaint in *Rosales VI* is a *verbatim duplicate* of the *Rosales X* Amended Complaint.[14] *Compare Rosales VI*, 3d Am. Compl. ¶¶ 6–75 *with Rosales X*, Am. Compl ¶¶ 5–74. Defendant has moved to strike plaintiffs' motion to amend. *Rosales X*, Def.'s July 7, 2009 Mot. to Strike Pls.' Mot. to Amend.

C. The Court Admits the Amended Complaints

In *Rosales VI*, the court hereby grants plaintiffs' motion for leave to substitute the Third Amended Complaint. Accordingly, the court denies as moot defendant's updated motion to dismiss, which was based on the claims asserted in the now-abrogated Second Amended Complaint.

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[14] There are only two differences between the two complaints: (1) the inclusion of Joe Comacho as a plaintiff, and (2) the recitation of two additional, wholly subordinate claims in the *Rosales VI* Third Amended Complaint (see *infra* Section III for discussion of these differences).

In *Rosales X*, the court hereby grants plaintiffs' motion for leave to substitute the Amended Complaint. Because the Amended Complaint in *Rosales X* alters nothing of the substance of the original complaint, however, the court deems defendant's previously filed motion for dismissal to apply to the Amended Complaint.

The court admits the newly amended complaints not because the circumstances satisfy the Supreme Court's standard for granting leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Indeed, plaintiffs arguably fail that standard in both cases and on multiple counts, including likely prejudice to defendant at this late stage in the suit (in both cases), bad faith on the part of plaintiffs (especially in *Rosales VI*, given the enormous departure that the purported "amendment" represents), and the futility of the amendments (in both cases). *See id.* To the contrary, the court grants leave to amend, for one *last* time in each case, in the hope of persuading plaintiffs of the inexorable futility of their obstinate fifteen-year campaign. In *Rosales VI*, the court would have granted defendant's updated motion to dismiss the Second Amended Complaint, on precisely the grounds articulated therein, and now dismisses *sua sponte* plaintiffs' Third Amended Complaint. Moreover, with two negligible exceptions (*see supra* note 14, and *infra* Section III), plaintiffs' Third Amended Complaint in *Rosales VI* and the Amended Complaint in *Rosales X* are *verbatim duplicates*, leaving before the court a single complaint, in all but name. In the shadow of plaintiffs' fifteen-year campaign of legal challenges, perpetuated in the face of repeated dismissals and adverse judgments on the merits, a campaign that has already wasted enormous administrative and judicial resources, the court will not refuse plaintiffs' inadvertent gift.

Having, in part, unscrambled the Rubik's Cube of where *Rosales VI* and *Rosales X* currently stand, and with identical complaints now before the court in both cases, the court's analysis begins—and ends—with the threshold question of whether it can adjudicate the merits of plaintiffs' claims in either case.

II. *ROSALES X*

Because of the significance for the court's decision of the near-identity of the Third Amended Complaint in *Rosales VI* and the Amended Complaint in *Rosales X*, the court routinely cites *both* complaints in the discussion below.

A. The Tucker Act's Statute of Limitations Is a Jurisdictional Bar to Plaintiffs' Claims

Before adjudicating the merits of a case, a court must first ensure that it has jurisdiction to hear and decide the matter before it. *E.g., Hardie v. United States*, 367 F.3d 1288, 1290 (Fed. Cir. 2004); *PIN/NIP, Inc. v. Platt Chem. Co.*, 304 F.3d 1234, 1241 (Fed. Cir. 2002). As the Supreme Court recently reiterated, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing th[at] fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The court should begin by "presum[ing] that a cause of action lies outside the limited jurisdiction of the federal courts." *Blueport Co. v. United States*, 533 F.3d 1374, 1381 (Fed. Cir. 2008) (citing *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994)). Plaintiffs, as the party requesting the exercise of judicial power, bear the burden of establishing, by a preponderance of the evidence, the court's jurisdiction. *See Blueport*, 533 F.3d at 1381.

1. The Tucker Act's Statue of Limitations Is a Jurisdictional Requirement for Suits in This Court

This court's jurisdiction flows principally from the Tucker Act, codified in pertinent part at 28 U.S.C. § 1491. Claims under the Tucker Act are subject to a six-year statute of limitations: "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. Unlike most statutes of limitations, which are typically treated as affirmative defenses, § 2501 is "a jurisdictional requirement for a suit in the Court of Federal Claims" and one that "may not be waived." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130, 128 S. Ct. 750 (2008); *see also Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitation for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature."). Accordingly, this court has an ongoing duty to address, even *sua sponte*, the application of § 2501 to the instant cases. *See, e.g.*, *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004) ("[s]ubject-matter jurisdiction may be challenged at any time by the parties or by the court *sua sponte*"). Moreover, because § 2501 is a jurisdictional requirement, the running of the limitations period is "not susceptible to equitable tolling." *John R. Sand & Gravel Co.*, 128 S. Ct. at 755; *see also Black v. United States*, 84 Fed. Cl. 439, 450 (2008) ("[E]quitable tolling of . . . § 2501 is foreclosed by the Supreme Court's decision in *John R. Sand & Gravel Co.*").

2. Claim Accrual Under § 2501

A claim accrues under § 2501, and the six-year limitations period begins to run, "when all events have occurred to fix the government's alleged liability, entitling the claimant to demand payment and sue here for his money." *Martinez*, 333 F.3d at 1303. Further, "it is not necessary that the damages from the alleged [wrong] be complete and fully calculable before the cause of action accrues." *Fallini v. United States*, 56 F.3d 1378, 1382 (Fed. Cir. 1995). Instead, the proper focus "is upon the time of the [defendant's] *acts*, not upon the time at which the consequences of the acts became most painful." *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980).

A narrow "accrual suspension" rule allows "the accrual of a claim against the United States [to be] suspended, for purposes of 28 U.S.C. § 2501, ... [only if] the plaintiff [can] either show that the *defendant has concealed its acts* with the result that plaintiff was unaware of their existence or . . . that its injury was *inherently unknowable* at the accrual date." *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (emphasis added) (internal quotation marks an citations omitted). The accrual suspension rule is strictly and narrowly applied. *Martinez*, 333 F.3d at 1319. In line with the Supreme Court's foreclosure of equitable considerations under § 2501, *John R. Sand & Gravel*, 128 S. Ct. at 755, the accrual suspension rule does not create a constructive notice requirement of the traditional sort:

> It is sometimes stated that accrual . . . will be suspended until the claimant "knew or should have known" that the claim existed. That articulation of the rule is not meant to set forth a different test . . . . [T]he "concealed or inherently unknowable" formulation . . . is both more common and more precise and we therefore endorse that formulation as the preferable one.

Ingrum v. United States, 560 F.3d 1311, 1315 n.1 (Fed. Cir. 2009) (internal citations omitted). Indeed, absent active concealment by defendant, accrual suspension requires what is tantamount to sheer impossibility of notice. *See Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967) ("An example of [an inherently unknowable injury] would be when defendant delivers the wrong type of fruit tree to plaintiff and the wrong cannot be determined until the tree bears fruit."); *Roberts v. United States*, 312 Fed. App'x 340, 342 (Fed. Cir. 2009) (affirming dismissal of plaintiffs' claims as untimely under § 2501, where plaintiff failed to demonstrate that his military service records were wholly unavailable).

3. Plaintiffs' Claims Accrued No Later Than 1982

Plaintiffs' claims all arise out of defendant's recognition of the Village as the beneficial owner of Parcels 04 and 05, and its failure to enforce plaintiffs' purported ownership interest in these parcels. *See, e.g.*, *Rosales X*, Am. Compl. ¶¶ 71, 78, 83; *Rosales VI*, 3d Am. Compl. ¶¶ 72, 83, 88. Plaintiffs' focus, *Rosales X*, Pls.' Opp'n at 2, 37, on their 2007 eviction is misguided. *See Del. State Coll.*, 449 U.S. at 258. While this eviction may be an additional injury resulting from defendant's act, and while it may set the accrual date for a hypothetical claim against the *Village*, it is wholly immaterial to accrual of the claims against defendant. *Id.* Similarly, any on-going grading, excavation, or other construction activity conducted by the Village, on Parcels 04 and 05, flows from the Village's exercise of beneficial ownership of these parcels. While this construction activity may represent further injury to plaintiffs, and may be the "most painful" yet of the consequences of defendant's acts, it is irrelevant to setting the accrual date for plaintiffs' claims. *Id.* Therefore, the NAGPRA violations alleged by plaintiffs are likewise tethered to defendant's initial grant of beneficial ownership over Parcels 04 and 05 to the Village. By that act, defendant repudiated any trust obligation that it allegedly owed plaintiffs—whether under IRA, NAGPRA or the common law—and, if plaintiffs were indeed the rightful beneficial owners of the land, effected a taking without just compensation. *See Jones v. United States*, 801 F.2d 1334, 1335–36 (Fed. Cir. 1986) ("A trustee may repudiate an express trust by words . . . or by actions inconsistent with his obligations under the trust.").

The same reasoning leads the court to reject plaintiffs' contention that the "continuing claims" doctrine restores the timeliness of their claims. *See Rosales X*, Pls.' Opp'n at 37–38. The continuing claims doctrine allows the adjudication of claims that would otherwise be untimely when the claims are "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages," and when at least one of these events falls within the limitations period. *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997) ("*Brown Park*"). However, "a claim upon a single distinct event, which may have *continued ill effects* later on, is *not* a continuing claim." *Id.* (emphasis added). On similar facts, the court previously refused to apply the continuing claims doctrine where plaintiffs alleged that the United States' "continued and repeated refusal to recognize [plaintiffs] as the rightful owners of [the disputed parcel] should be considered a continuing wrong." *Voison v. United States*, 80 Fed. Cl. 164, 176 (2008). Plaintiffs here conclude that their claims did not accrue until March 10, 2007, the date on which the Village allegedly evicted them from their homes. *Rosales X*, Pls.' Opp'n at 2. By their logic, it is unclear to the court why they do not contend that their claims are accruing still, since they allege that the grading and excavation of Parcels 04 and 05 are on-going. *See, e.g.*, *Rosales X*, Am. Compl. ¶¶ 60, 71(4); *Rosales VI*, 3d Am. Compl. ¶¶ 61, 72(4). Regardless, plaintiffs' contention is flawed. While the 2007 eviction may be a belated injury caused by defendant's acts, it is not an "independent and distinct event or wrong," *Brown Park*, 127 F.3d at 1456, for which defendant is responsible, and thus does not support application of the continuing claims doctrine.

In sum, it is a single act by defendant, with respect to each of these two parcels, that marked the final event "fix[ing] the government's alleged liability, entitling [plaintiffs] to demand payment and sue here for [their] money." *Martinez,* 333 F.3d at 1303. Based largely on plaintiffs' own pleadings, the court fixes the time of this accrual-triggering event at nearly three decades ago. Plaintiffs claim that defendant failed to enforce the deeds to, and plaintiffs' beneficial ownership of, Parcels 04 and 05. *Rosales X*, Am. Compl. ¶ 71(1); *Rosales VI*, 3d Am. Compl. ¶ 72(1). Parcel 04 was conveyed to the United States, in trust for "half-blood Jamul Indians," on December 12, 1978; the grant deed was recorded on December 27 of that year. *Rosales X*, Am. Compl. ¶ 13; *Rosales VI*, 3d Am. Compl. ¶ 14. As the Ninth Circuit previously observed in 2003, the Jamul Indian Village began asserting beneficial ownership over Parcel 04 no later than 1981. *See Rosales VII Affirmance*, 73 F. App'x at 914. Parcel 05 was deeded to the United States "in trust for the Jamul Indian Village"—not for plaintiffs as individuals—on July 27, 1982. *Rosales X*, Am. Compl. ¶ 24, Ex. F; *Rosales VI*, 3d Am. Compl. ¶ 25, Ex. F. Therefore, as to Parcel 05, plaintiffs' claims accrued on July 27, 1982, when defendant accepted that parcel in trust for the Village. As to Parcel 04, plaintiffs' claims accrued some time in 1981, when the Jamul Indian Village was formed, *Rosales X*, Am. Compl. ¶ 22, *Rosales VI*, 3d Am. Compl. ¶ 23, and began exercising jurisdiction over that parcel, *Rosales VII Affirmance*, 73 F. App'x at 914.

Finally, defendant's acts must have been actively concealed or inherently unknowable for plaintiffs' claims to be eligible for accrual suspension. *Ingrum*, 560 F.3d at 1315 n.1. Plaintiffs have not alleged that defendant concealed, or sought to conceal, its acceptance of Parcels 04 and 05 in trust for the Jamul Tribe collectively or its recognition of the Village as the beneficial owner of these parcels. Nor was this injury inherently unknowable, by any stretch of the imagination. Plaintiffs, therefore, cannot hope to meet the stringent standard for accrual suspension.

4. The Indian Trust Accounting Statute Is Unavailable to Suspend the Accrual of Plaintiffs' Claims

In the alternative, plaintiffs contend that the Indian Trust Accounting Statute ("ITAS"), Pub. L. No. 108-108, 117 Stat. 1263 (2003),[15] operates to suspend the accrual of their claims until defendant provides plaintiffs with a complete accounting of their trust. *Rosales X*, Pls.' Opp'n at 35–37. Defendant responds that ITAS only applies to trust *funds*, not trust assets such as the land parcels at issue. The court agrees. ITAS states, in pertinent part:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including a claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of

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[15] ITAS was first adopted in 1990, and has been readopted each year since without any material changes. Because plaintiffs cite to the 2003 version of ITAS, so does the court.

> trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 108-108, 117 Stat. 1263 (2003). Thus, when ITAS applies, the Tucker Act's statute of limitations does not begin to run, nor does a claim accrue for breach of fiduciary duty regarding a trust fund, until the complaining Indian tribe or individual has received an accounting, thereby learning of the trustee's repudiation. *See Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347–48 (Fed. Cir. 2004).

Shoshone held that ITAS only applies to trust *funds*, and that the statute does not toll a claim for breach of fiduciary duty regarding trust *assets*. *See id.* at 1348–50. As the Federal Circuit explained, claims regarding trust funds include claims concerning the trustee's duty (1) to collect payments under tribe contracts, (2) to deposit collected money into the tribes' interest-bearing trust accounts, and (3) to assess contractual penalties for late payment against breaching parties. *Id.* at 1350. In contrast, ITAS does not apply to *assets* held in trust, such as sand and gravel, timber, or oil and gas assets. *See Shoshone*, 364 F.3d at 1350 (holding that ITAS did not apply to gravel and sand assets); *Oenga v. United States*, 83 Fed. Cl. 594, 609 (2008) (holding ITAS only extended the statute of limitations concerning the collection of royalties from gas and oil assets, i.e., funds); *Simmons v. United States*, 71 Fed. Cl. 188, 193 (2006) (holding that ITAS did not apply to a claim for breach of fiduciary duty for government mismanagement of timber assets).

Here, plaintiffs' claims for breach of fiduciary duty center on parcels of land, which are assets held in trust, not trust funds. ITAS is therefore unavailable to toll the accrual of plaintiffs' claims.

5. Plaintiffs' Claims Are Barred by the Statute of Limitations

Plaintiffs' claims accrued in 1981 and 1982, as to Parcels 04 and 05, respectively. The six-year limitations period, under § 2501, thus expired no later than 1988, nearly two decades before plaintiffs filed their original complaint in *Rosales X*, on July 15, 2008.[16] Because plaintiffs' claims are ineligible for accrual suspension, and because neither ITAS nor the continuing claims doctrine are apposite, plaintiffs' claims cannot clear the jurisdictional bar of the Tucker Act's statute of limitations.

B. Issue Preclusion Bars Adjudication of Plaintiffs' Claims

Assuming, *arguendo*, that plaintiffs' claims in *Rosales X* are timely, the Village's absence as a party to this litigation is a sufficient, independent ground for dismissal. Plaintiffs' claims in *Rosales X* rest upon the foundational assumption that plaintiffs, not the Village, are the rightful beneficial owners of Parcels 04 and 05. *See Rosales X*,

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[16] The Amended Complaint in *Rosales X*, asserting the identical claims and arising out of the identical "conduct, transaction, or occurrence" set out in the original complaint, qualifies for relation back to the original filing date, pursuant to RCFC 15(c)(1).

Am. Compl. ¶¶ 75–87. Over the course of the labyrinthine history of these disputes, other courts have determined that plaintiffs cannot maintain any claims that assert, explicitly or implicitly, beneficial ownership of tribal land, such as Parcels 04 and 05, without joining the Village, a "necessary and indispensable" party. *Rosales VII Affirmance* at 914–15; *Rosales IX* at *5–*6. The doctrine of issue preclusion bars plaintiffs from challenging that determination.

Issue preclusion, or collateral estoppel,[17] is "grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again." *Warthen v. United States*, 157 Ct. Cl. 798, 798 (1962). Issue preclusion "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 & n.5 (1979); *Morgan v. Dep't of Energy*, 424 F.3d 1271, 1274 (Fed. Cir. 2005). Granting preclusive effect to the determination of issues upholds a "fundamental precept of common-law adjudication," namely, that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties . . . ." *Montana v. United States*,

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[17] While this court prefers the doctrine's more precise label of "issue preclusion," many courts continue to use the term "collateral estoppel" either exclusively or interchangeably with "issue preclusion."

440 U.S. 147, 153 (1979). Thus, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a *different claim.*" RESTATEMENT (SECOND) OF JUDGMENTS[18] § 27 (1982) (emphasis added).

Plaintiffs' claims in the instant case rest upon the foundational assumption that they, not the Village, are the rightful beneficial owners of Parcels 04 and 05. Adjudication of their claims thus requires, as a first step, a determination of the ownership status of these two parcels. The success of plaintiffs' claims in *Rosales IX* was likewise contingent on their claim of beneficial ownership to Parcel 04. *See Rosales IX* at *4. In that case, plaintiffs claimed, as they do before this court, that the Native American Graves Protection and Repatriation Act (NAGPRA) imposed an affirmative duty of trust upon the federal government to prevent construction on those parcels of land, including Parcel 04, where Native

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[18] In *Young Engineers, Inc. v. United States International Trade Commission*, 721 F.2d 1305, 1314 (Fed. Cir. 1983), the Federal Circuit cited and quoted relevant provisions of the RESTATEMENT (SECOND) OF JUDGMENTS (1982) in order to determine issues of *res judicata*, collateral estoppel, and issue and claim preclusion. The Federal Circuit continues to rely on the RESTATEMENT to guide its analysis of preclusion, and continues to cite *Young Engineers* in support of that reliance. *See, e.g., Jet, Inc. v. United States*, 223 F.3d 1360, 1362 (Fed. Cir. 2000) (citing *Young Engineers* for the proposition that the "Federal Circuit would receive guidance from RESTATEMENT (SECOND) OF JUDGMENTS (1982)").

American remains allegedly exist. *See Rosales IX* at *2, *8–*10. Plaintiffs asserted that this duty was owed to them as the beneficial owners of Parcel 04. *Id.* The *Rosales IX* court held that plaintiffs could not dispute the ownership of that land in the absence of the Village, whose ownership interest was directly implicated, and whose joinder was barred by sovereign immunity. *Id.* at *5–*6. Concluding that the United States could not adequately represent the Village's interests, the *Rosales IX* court refused to allow its plaintiffs to "make an end run around tribal sovereign immunity by suing the United States" and litigating the ownership status of Parcel 04 without the Village. *Id.* *Rosales IX* held that, pursuant to Rule 19 of the FEDERAL RULES OF CIVIL PROCEDURE ("FRCP"),[19] the Village is a "necessary and indispensable" party to any such litigation; the court granted, with prejudice, the government's motion for dismissal. *Id.* at *10. Significantly, that court denied plaintiffs leave to amend their complaint, noting that any amendment asserting that the land at issue is federal, rather than tribal, would be futile. *Id.*

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[19] 19. FRCP 19 is identical, in pertinent part, to RCFC 19. As part of the 2007 amendments to FRCP 19, the word "necessary" was replaced with "required" in subparagraph (a), and the term "indispensable" was deleted from subparagraph (b), for being at once redundant and conclusory. *See* Advisory Committee's Notes on 2007 Amendment to FRCP 19. The current version to RCFC 19 follows suit. Many courts, however, including the *Rosales IX* court, have continued to use the label of "necessary and indispensable," in referring to a party whose joinder is required under Rule 19(a), but who cannot be joined, and without whom the court decides, pursuant to Rule 19(b), that it cannot proceed. This court prefers to follow the current language of the rule. However, the significance of the *Rosales IX* opinion to this court's present holding counsels in favor of using the language of "necessary and indispensable party," lest differences in terminology obfuscate the substantive similarities between the two matters.

Pointing to the holding in *Rosales IX*, defendant raises issue preclusion as a bar to plaintiffs' claims.[20] *Rosales X*, Mot. to Dismiss at 15–16. Under the Federal Circuit's test, the party invoking issue preclusion must show that:

> (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the first action.

Innovad Inc. v. Microsoft Corp., 260 F.3d 1326, 1334 (Fed. Cir. 2001). The court addresses the four prongs of this test, *seriatim*.

1. Identity of the Issue

Under the first prong of the test, the question is whether the issue of the Village's status as a necessary and indispensable party is the same in the instant litigation as it was in *Rosales IX*.

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[20] Remarkably, in arguing that issue preclusion should not bar their claims, plaintiffs cite cases from the Sixth, Eighth, and Ninth Circuits, whose precedent is not binding upon this court, while failing to cite a single Federal Circuit case, concerning the effect or scope of issue preclusion. *See Rosales X*, Pls.' Opp'n at 40–44.

The *Rosales X* claims rest no less critically upon plaintiffs' assertion of beneficial ownership of tribal land (Parcels 04 and 05) than did their unsuccessful claims in *Rosales IX*. *Compare Rosales X*, Am. Compl. ¶¶ 78 (claiming that defendant breached its duties to plaintiffs by "failing to enforce the deed to, and Plaintiffs' beneficial ownership of, [Parcels 04 and 05]") *and* 83–85 (claiming that this same failure effected a taking), *with Rosales IX* at *4 (discussing plaintiffs' claims of beneficial ownership in Parcel 04). Plaintiffs still rely, as they did in *Rosales IX*, upon NAGPRA to establish defendant's alleged breach of its fiduciary duty, in failing to stop construction activity on Parcels 04 and 05. *Compare Rosales X*, Am. Compl. ¶ 71(4)–(10) (setting forth plaintiffs' NAGPRA claims) *with Rosales IX* at *8–*10 (rejecting plaintiffs' arguments that the government has any affirmative duties pursuant to NAGPRA to prevent the inadvertent discovery of human remains on these same parcels).

Moreover, the facts that plaintiffs marshal in support of their *Rosales X* claims duplicate, in large swaths, the facts alleged in *Rosales IX*. *Compare, e.g., Rosales X*, Am. Compl. ¶¶ 11–21, 28–51 (detailing plaintiffs' claims to beneficial ownership of Parcel 04) *with Rosales IX*, Am. Compl. ¶¶ 19–30, 33–42, 44–54 (same); *see also Rosales VI*, 3d Am. Compl. ¶¶ 12–22, 29–52 (same). The evidence that plaintiffs use to support their present complaint is likewise recycled: of thirteen exhibits that accompanied the *Rosales IX* complaint, plaintiffs have attached eleven to their *Rosales X* Amended Complaint (and to the Third Amended Complaint in *Rosales VI*). *Compare Rosales X*, Am. Compl., Exs. List, *with Rosales IX*, Am. Compl, Exs.

List; *see also Rosales VI*, 3d Am. Compl, Exs. List. Even typographical errors in the *Rosales X* complaint (and in the *Rosales VI* Third Amended Complaint) unwittingly reveal the extent to which plaintiffs are re-litigating *Rosales IX*. Specifically, the complaints share the same mistyped citation to a Memorandum of the Solicitor of the Department of the Interior: "*supra* not [sic] 76, at 1497." *Compare Rosales X*, Am. Compl. ¶ 42 *and Rosales VI*, 3d Am. Compl. ¶ 43 *with Rosales IX*, Am. Compl. ¶ 45.

Thus, it is manifest that *Rosales IX* decided the identical issue now before this court, namely, whether the Village is an indispensable party to the adjudication of claims challenging the Village's ownership interest in tribal land.

Finally, aside from the exact identity of the issue, the policy underlying the doctrine of issue preclusion supports its application in this instance. Where exact identity of an issue is lacking, "[t]he problem involves a balancing of important interests: on the one hand a desire not to deprive the litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute." RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. c (1982). After myriad chances, in numerous venues, to litigate their claims—either disputing the results of tribal elections and defendant's recognition thereof, or asserting that defendant unlawfully transferred plaintiffs' land to the Village—plaintiffs cannot plausibly protest that they have been deprived of their day in court. This court can only conclude that plaintiffs in *Rosales X* have simply recycled their NAGPRA-based breach of duty claims from *Rosales IX*, while adding sparse references to IRA in an attempt to invoke this court's jurisdiction.

2. Whether the Issue Was Actually Litigated

The second prong of the Federal Circuit's test for issue preclusion asks whether the issue has been litigated previously. *See Innovad*, 260 F.3d at 1334. This prong merely requires that the issue was (1) properly raised (by the pleadings or otherwise), (2) submitted for determination, and (3) determined. *Franklin Sav. Corp.*, 56 Fed. Cl. at 738 (citing *Banner v. United States*, 238 F.3d 1348, 1354 (Fed. Cir. 2001) and RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. d (1982)).

First, upon review of the procedural history in *Rosales IX*, it is clear that the Village's status as a necessary and indispensable party was properly raised in that case. The claims in the *Rosales IX* complaint, as cited above, clearly implicate this issue. Second, the parties in *Rosales IX* obviously submitted this issue for determination: the issue was addressed in the defendant's motion to dismiss and in plaintiffs' opposition thereto, and was the subject of oral argument before the *Rosales IX* court. *See Rosales IX*, Mot. to Dismiss at 12–17; *Rosales IX*, Pls.' Opp'n at 25–31. Finally, the *Rosales IX* court made clear that its dismissal, with prejudice and without leave to amend, was grounded squarely in its determination that the Village was a necessary and indispensable party to the adjudication of any claims implicating the ownership status of the land at issue. *Rosales IX* at *5–6, *10. The second prong of the test for erecting issue preclusion as a bar to plaintiffs' claims is thus easily met.

3. Whether Determination of the Issue Was Essential to the Resulting Judgment

The inquiry under the third prong of the test does not require that the prior determination of an issue "be so crucial that, without it, the [prior] judgment could not stand." *Mother's Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed. Cir. 1983). Rather, this third requirement seeks to prevent a mere incidental or collateral determination of a nonessential issue from precluding that issue's determination in a later litigation. *Id.* The final judgment in *Rosales IX* was a dismissal without leave to amend. *Rosales IX* at *10. Significantly, the *Rosales IX* court emphasized that any attempts to amend the complaint would be futile because "plaintiffs cannot assert a claim that the land is federal without joining the [Village]." *Id.* Thus, it is clear that this prior determination of the issue in question—that the Village is a necessary and indispensable party in any dispute implicating the ownership status of tribal land—was not incidental, but necessary to the final judgment in *Rosales IX*.

4. Whether Plaintiffs Had a Full and Fair Opportunity to Litigate

Finally, a party against whom issue preclusion is sought must have had a "full and fair opportunity" to litigate in the prior proceeding. *Banner*, 238 F.3d at 1354;

Jet, Inc., 223 F.3d at 1366. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(C) (1982). In assessing whether a party had such an opportunity, the court should consider: (1) whether there were significant procedural limitations in the prior proceeding; (2) whether the party had incentive to fully litigate the issue; and (3) whether the nature of, or relationship between, the parties limited effective litigation. *See Banner*, 238 F.3d at 1354 (citing 18 CHARLES ALAN WRIGHT, ARTHUR R.MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4423 (1981)).

Here, the court can easily dispense with the latter two factors. As their filings in that case indicate, plaintiffs clearly had a strong incentive to litigate *Rosales IX*. There, as in *Rosales X*, plaintiffs alleged that their family members' gravesites were being desecrated and their remains and associated funerary objects removed or destroyed by on-going excavation and construction. *Compare, e.g.*, *Rosales X*, Am. Compl. ¶¶ 52–55, 60 (detailing plaintiffs' factual allegations concerning their family members' remains), *with Rosales IX*, Am. Compl. ¶¶ 62–63, 67–73 (reciting identical allegations). According to plaintiffs, that interference with their family members' remains "has caused and will continue to cause severe personal, physical, and bodily injury, including severe emotional distress." *Id.* ¶¶ 72–73. This court cannot conclude that plaintiffs' incentive to litigate *Rosales IX* was in any way insufficient. *See Franklin*, 56 Fed. Cl. at 739 (citing WRIGHT, MILLER & COOPER for the proposition that the stakes of prior litigation may prove the full incentive to litigate). The multiple cases in which plaintiffs have previously litigated related or similar claims, *see supra* note 2, also indicates the strength of their incentive to litigate. *See id.* at 739–40 (inferring the existence of this incentive "from the she[e]r number of times [the plaintiff] litigated [its] claims). As for the third factor, the nature or relationship of the parties did not limit plaintiffs' opportunity to litigate in *Rosales IX*, because plaintiffs were neither members of a disabled class requiring a guardian nor were they *pro se* litigants. *See id.* at 740 (citing Wright, Miller & Cooper).

Nor do plaintiffs fare any better on the first factor, which considers whether there was a significant procedural hurdle in *Rosales IX*. As the Supreme Court has observed, "the full and fair opportunity to litigate" criterion is generally satisfied as long as the procedures in the first action comported with minimum due process requirements. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982). In other words, plaintiffs cannot establish this factor without establishing that they were unrepresented by counsel, unable to appeal, denied a public hearing, or deprived of necessary facts fraudulently concealed by the government. *See Franklin* 56 Fed. Cl. at 741. Plaintiffs have not identified any such procedural hurdle. In short, the *Rosales IX* plaintiffs had, and certainly made the most of, their full and fair opportunity to litigate.

Having satisfied all four prongs of the Federal Circuit's test for issue preclusion, the *Rosales IX* decision thus bars the adjudication of plaintiffs' claims in *Rosales X*, absent the Village. Because plaintiffs have not and cannot cure the defect of the Village's absence, this court cannot permit "[s]uch a fundamental departure from traditional rules of preclusion," as adjudicating plaintiffs' claims would require. *See Kremer*, 456 U.S. at 485.

C. The Village Remains a Necessary and Indispensable Party

Assuming, *arguendo*, that plaintiffs' claims could escape the preclusive effect of *Rosales IX*, the court nonetheless must dismiss the complaint in *Rosales X*, pursuant to RCFC 19, for failure to join the Village, a necessary and indispensable party. As the court has noted repeatedly, plaintiffs' claims in *Rosales X* rest critically upon plaintiffs' assertion that they, not the Village, are the rightful beneficial owners of Parcels 04 and 05. This court is convinced, for many of the reasons recited above in Section II.B, that the Village must be a party to this or *any* litigation in which its ownership interests are implicated and, indeed, would be implicitly abrogated by a judgment in favor of plaintiffs. Simply put, this court agrees with the substantive analysis of the *Rosales IX* court.[21]

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[21] This court disagrees, however, with the jurisdictional label that the *Rosales IX* court attached to its determination. *See Rosales IX* at *5 ("Because the Tribe enjoys sovereign immunity and cannot be joined, the court lacks subject matter jurisdiction."). Both RCFC 19(b) and FRCP 19(b) (the latter governing the *Rosales IX* court) state that a court must decide "in equity and good conscience," whether to dismiss an action for non-joinder of a required party. In other words, Rule 19 codifies an *equitable* doctrine, not a jurisdictional requirement as the *Rosales IX* court suggested. Indeed, the "indispensability question . . . is not, nor has it ever been, jurisdictional." *Rippey v. Denver United States Nat'l Bank*, 42 F.R.D. 316, 318-319 (D. Colo. 1967).

1. The Village Is a Necessary Party, Whose Joinder Is Required Under RCFC 19(a)

Pursuant to RCFC 19, this court must ask whether an absent party is necessary to the litigation, and its joinder thus required. *United Keetoowah Band of Cherokee Indians of Okla. v. United States* ("*UKB*"), 480 F.3d 1318, 1324 (Fed. Cir. 2007); *see* RCFC 19(a). In relevant part, RCFC 19(a) states that joinder is required if:

> [T]hat [party] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may: (i) as a practical matter *impair or impede the [party]'s ability to protect the interest*; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rather, Rule 19 calls for determining whether the court ought to proceed without the absent party, not whether it has jurisdiction to proceed against those who are present." *Id.* In *Shields v. Barrow*, the Supreme Court explained that "when speaking of a case where an indispensable party [is] not before the court, we do not put th[e] case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." 58 U.S. 130, 141 (1855). *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1611 (3d ed. 1998). Needless to say, Rule 19 does codify a threshold inquiry, which, like the jurisdictional inquiry, may operate to foreclose adjudication on the merits.

RCFC 19(a) (emphasis added).

Plaintiffs' contention that the Village's interest is merely "indirect and contingent," *Rosales X*, Pls.' Opp'n at 46, is at odds with reality. Defendant has a duty as the trustee of Parcels 04 and 05, and is liable to the beneficial owners for any breach of that duty. Adjudicating plaintiffs' claims would require determining the threshold question of plaintiffs' beneficial ownership of Parcels 04 and 05, and thus necessarily implicates the Village's ownership interest. *See, e.g.*, *Rosales IX* at *5–*6. This court would require from the Village a waiver of sovereign immunity, which waiver the court does not have, in order to render a judgment in this matter. Any potential judgment in plaintiffs' favor, requiring defendant to remedy what plaintiffs characterize as interference with their ownership rights to Parcels 04 and 05, would necessarily "impair or impede" the Village's ownership interest in that land.

The Village has the additional and "substantial interest in protecting the rulings of its judicial system from collateral attack." *St. Pierre v. Norton*, 498 F. Supp. 2d 214, 220 (D.D.C. 2007). The Jamul Tribal Court has determined, in upholding plaintiffs' 2007 eviction, that plaintiffs were *not* the beneficial owners of Parcel 04. *Rosales X*, Mot. to Dismiss, Exs. 7–8. Plaintiffs' contention that the recognized Jamul Tribal Court is invalid, *Rosales X*, Pls.' Opp'n at 43–45, is irrelevant. Even if this court were inclined to agree, contrary to the decisions of all previous courts and administrative bodies adjudicating the Village's electoral disputes, the Village would *still* have an interest in challenging that determination and asserting the validity of its court's decisions.

Finally, this court rejects plaintiffs' conclusory contention that the Village has no legally protected interest at issue in the instant case. *See Rosales X*, Pls.' Opp'n at 48–49. That contention is based on plaintiffs' oft-asserted, but never-successful theory that the Village, a political entity permitting membership to those of at least *one-quarter* Jamul Indian blood, has never had proper beneficial ownership of Parcels 04 or 05, which parcels instead remain in trust only for individuals of *one-half* Jamul Indian blood. *Id.* at 49 (citing *Rosales X*, Compl. ¶¶ 14–15, 27–28, 31–37, 40, 44–46 & Ex. E); *see also Rosales VI*, Pls.' Opp'n. at 48–49 (making the same argument). Both the *Rosales VII* and *Rosales IX* courts flatly rejected this legal just-so story; so, too, does this court.

Rather, the Village has substantial interests in the outcome of this case, and those interests would be impaired by proceeding in the Village's absence. Joinder of the Village is, therefore, required under RCRC 19(a). That joinder, which ordinarily is subject to court order, is barred by the Village's sovereign immunity.

2. The Village Is an "Indispensable" Party

Where joinder is required under RCFC 19(a) but is not feasible, a court must determine whether, "in equity and good conscience, the action should proceed among the existing parties or be dismissed." RCFC 19(b). If a court decides that the matter should be dismissed, the absent party is thus deemed "indispensable." *See, e.g.*, *UKB*, 480 F.3d at 1324. Rule 19 identifies four factors that are relevant to deciding whether a matter may proceed without the absent party:

> (1) the extent to which a judgment rendered in the [party]'s absence might prejudice that [party] or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
>
> (3) whether a judgment rendered in the [party]'s absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

RCFC 19(b).

The claims that plaintiffs advance—seeking redress for the United States' alleged breach of its duty to them as beneficial owners of Parcels 04 and 05—directly implicate the Village's ownership interests in, and its exercise of jurisdiction over, that land. Therefore, this court cannot fashion relief that would not prejudice the interests of the Village in asserting its beneficial ownership of the land at issue, *see Rosales VII Affirmance* at 914; *Rosales IX* at *5–*6, or in enforcing the judgments of its tribal courts, *St. Pierre*, 498 F. Supp. 2d at 220.

This court is persuaded by the Ninth Circuit's body of precedent, which holds that the United States cannot adequately represent the interests of an absent tribe in an "intertribal" dispute, a category that includes disputes between a tribe and non-tribe groups or individuals. Upon similar facts, the Ninth Circuit held that "no partial or compromise remedy exists that will not prejudice the [tribal government], since a finding that the [claimants have] rights to the beneficial ownership of the [land] or that the [United States] government owes certain duties to the [claimants] will prejudice the [tribal government]'s right to govern the Tribe, which is the designated beneficial owner of the land." *Pit River Home & Agr. Coop. Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994). Further persuasive is the *Rosales VII Affirmance*, which held, upon review of the same facts giving rise to the instant action, that "[t]he United States is not an adequate representative of the Village's interests in this action because the United States cannot adequately represent the interests of one tribe in an intertribal dispute." 73 F. App'x at 914.

Because the United States cannot adequately represent the interests of the Village, and because the court cannot otherwise fashion relief that would not prejudice those substantial interests, this court cannot, in equity and good conscience, proceed to adjudicate plaintiffs' claims in the Village's absence. Because the Village has not waived its sovereign immunity, the court is without power to compel the Village's joinder. The Village is, therefore, an indispensable party to the instant action. Assuming, *arguendo*, that all other grounds for dismissal are inadequate, the court must nonetheless dismiss the complaint in *Rosales X*, pursuant to RCFC 19.

III. *ROSALES VI*

The Third Amended Complaint in *Rosales VI* is a verbatim copy of the *Rosales X* Amended Complaint, with three notable, though ultimately inconsequential exceptions.

A. The Two Additional Claims Raise No New Issues

In their Third Amended Complaint, the *Rosales VI* plaintiffs recite four claims for relief: the two claims made in *Rosales X*—(1) taking, and (2) breach of trust—along with two additional claims for (3) breach of contract, and (4) accounting. *Rosales VI*, 3d Am. Compl. ¶¶ 76–79, 93–98. The two additional claims, however, raise no new issues for the court to consider: they rest upon the identical allegations of fact and the identical theories of defendant's liability as do the *Rosales X* claims. Most significantly, these additional claims rest squarely upon the same foundational assumption that plaintiffs, not the Village, are the beneficial owners of parcels 04 and 05, and thus likewise implicate the Village's interests.

B. The Earlier Filing Date Still Leaves the Claims in Rosales VI Untimely Under § 2501

The original complaint in *Rosales VI* was filed on November 12, 1998, nearly a decade before the original *Rosales X* filing. However, because the six-year limitations period for plaintiffs' claims expired in 1988, the 1998 filing date in *Rosales VI* is still a decade too late.[22]

Claim accrual under § 2501 may be suspended only where the injury is actively "concealed or inherently unknowable," *Ingrum*, 560 F.3d at 1315 n.1, a standard that plaintiffs cannot hope to satisfy. There is otherwise no traditional requirement of notice, in order for a claim to accrue, or for the limitations period to run, under § 2501. Prior to the Supreme Court's holding in *John R. Sand & Gravel*, however, language in some opinions, issued by the Court of Federal Claims and by the Federal Circuit, arguably suggested otherwise. In *Mitchell v. United States*, 10 Cl. Ct. 63, 68 (1986), the court declared that "[k]nowledge of a cause of action sufficient to trigger the running of the [Tucker Act's] statute of limitations may, therefore, be as much a matter of constructive notice as of actual notice." Nearly a decade later, the Federal Circuit seemed to sound a similar note, writing that "[t]he question whether the pertinent events [for claim accrual] have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." *Fallini*, 56 F.3d at 1380. While the quoted language unambiguously disavowed a requirement of *actual* notice, it seemed to evince a *constructive*-notice requirement under § 2501.

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[22] The court assumes, without deciding, that the Third Amended Complaint qualifies for relation back to the date of the original complaint, under RCFC 15(c)(1). Absent this assumption, of course, the Third Amended Complaint, submitted in 2009, would be even tardier than the original complaint in *Rosales X*.

Defendant, in its motion to dismiss *Rosales X*, cites to these cases, apparently conceding that constructive notice may be required. *See Rosales X*, Mot. to Dismiss at 11. Accordingly, defendant cites the language of the 1982 deed to Parcel 05, *see supra* Section III.A.3, which the court agrees is sufficient to support a finding of constructive notice. *Rosales X*, Mot. to Dismiss at 13. As to parcel 04, defendant's *Rosales X* motion points only to plaintiffs' admission to having *actual* notice, in 2001, of defendant's recognition of the Village's beneficial ownership of that parcel. *Id.* at 12 (citing *Rosales VII*, Compl. ¶¶ 18–19). Defendant is content to rely on the 2001 date, in its *Rosales X* motion, because even that date is early enough to render time-barred plaintiffs' 2008 complaint. The original *Rosales VI* complaint, on the other hand, was filed in 1998. Lest plaintiffs, in their litigious zeal, see an opening here, the court assures them there is none.

No hypothetical notice requirement can restore the timeliness of plaintiffs' complaint in *Rosales VI*. In order for the 1998 filing to be timely, plaintiffs' claims need to have accrued no earlier than November 13, 1992. Defendant recognized the Village's beneficial ownership of parcels 04 and 05, in 1981 and 1982, respectively. It defies the imagination that, over the course of the subsequent decade, plaintiffs did not have *actual*, let alone constructive, notice of defendant's act, or of conduct by the Village inconsistent with their beneficial ownership, as individuals, of the land in question.

C. The Village's Status As an Indispensable Party Is Unaltered by the Presence of a New Plaintiff

Of the twelve plaintiffs named in the original *Rosales VI* complaint, only two remain: Walter Rosales and Joe Comacho. *See supra* note 6. Plaintiff Comacho was not a named plaintiff in *Rosales IX* and thus would ordinarily be exempt from the preclusive effect of that judgment. *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue . . . . Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."). *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 238 (1998) ("In no event, we have observed, can issue preclusion be invoked against one who did not participate in the prior adjudication.").

However, the claims in *Rosales VI* implicate no less than do the *Rosales X* claims the Village's interests in asserting its beneficial ownership over Parcels 04 and 05, and in protecting the integrity of its judicial system. Mr. Comacho's presence as a plaintiff, therefore, cannot alter this court's own substantive holding that the Village is a necessary and indispensable party, in whose absence the court cannot proceed to adjudicate the merits of plaintiffs' claims.

Nor is there consequence to the absence of a party motion for dismissal on this ground. Because the court admits plaintiffs' Third Amended Complaint through its present order, defendant has not had an opportunity to submit a new motion to dismiss, responsive to plaintiffs' revised complaint, and thus has not raised the issue of the Village's absence as a ground for dismissal in *Rosales VI*. However, as the Supreme Court recently reiterated, a court may consider *sua sponte* the absence of a required party, under Rule 19, and dismiss an action for non-joinder. *Philippines v. Pimentel*, _ U.S. _, 128 S. Ct. 2180, 2188 (2008) (reversing the lower court's decision to adjudicate an interpleader action amongst the remaining parties, after two parties originally named in the suit invoked sovereign immunity and were dismissed).

Therefore, despite the above differences between the *Rosales X* and *Rosales VI* complaints, the court's grounds for dismissing the former support no less surely dismissal of the latter.

IV. CONCLUSION

Plaintiffs' motion to admit the Amended Complaint in *Rosales X* is **GRANTED**. The court concludes that plaintiffs' claims in *Rosales X* are untimely under the Tucker Act's statute of limitations, leaving the court without jurisdiction to hear them. To the extent that any of plaintiffs' claims are timely, the doctrine of issue preclusion nonetheless bars plaintiffs from relitigating the defect that mandated dismissal in *Rosales IX*. Finally, even if plaintiffs' claims were both timely and somehow exempt from the preclusive effect of *Rosales IX*, this court concludes that it must dismiss the action due to the absence of the Village, a necessary and indispensable party. Accordingly, defendant's motion to dismiss in *Rosales*

X is **GRANTED**, and plaintiffs' motion for summary judgment and all other outstanding motions in *Rosales X* are therefore **DENIED-AS-MOOT**.

Plaintiffs' motion to admit the Third Amended Complaint in *Rosales VI* is **GRANTED**. As in *Rosales X*, the court concludes that plaintiffs' claims in *Rosales VI* are untimely under the Tucker Act's statute of limitations, leaving the court without jurisdiction to hear them. To the extent that any of plaintiffs' claims are timely, the Village remains a necessary and indispensable party, in whose absence the court must dismiss the action. Accordingly, the Third Amended Complaint in *Rosales VI* is **DISMISSED**, and defendant's updated motion to dismiss the prior Second Amended Complaint and all other outstanding motions in *Rosales VI* are therefore **DENIED-AS-MOOT.**

Furthermore, based on plaintiffs' history of repeating the same claims across multiple suits and venues, and their pattern, in these proceedings, of non-responsive filings, of repeated noncompliance with the rules of this court, of poor citation practices, and of wholesale copying of previous filings in other venues that were dismissed with prejudice, this court assigns **COSTS TO DEFENDANT.**

IT IS SO ORDERED.

/s/
Lawrence J. Block
Judge

APPENDIX E — RELEVANT STATUTES AND RULES

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E

25 U.S.C. § 465

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Appendix E

25 U.S.C. § 479

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Appendix E

RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) **Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) **Joinder by Court Order.** If a person has not been joined as required, the court must order that the

person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) **Venue.** [Not used.]

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgement rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to RCFC 23.